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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

**UNIROYAL, INC.,**

*Petitioner,*

v.

**ALTA CHRAPLIWY, *et al.*,**

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Does Section 706(k) of Title VII of the Civil Rights Act of 1964 authorize an award of attorney's fees for participation in court and administrative proceedings which are not mandated or required by the enforcement scheme of Title VII under this Court's holding in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980)?

May plaintiffs' attorneys be awarded fees in a Title VII proceeding for their participation in court proceedings which are not a part of the enforcement scheme of Title VII and in which either the Title VII plaintiffs or defendant was not even a party?

Whether the Seventh Circuit erred by making an independent finding of fact as to the appropriate hourly rate to be used in computing a reasonable attorney's fee under Section 706(k) contrary to the "clearly erroneous" standard set forth in F.R.C.P. 52(a)?

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Uniroyal, Inc. (hereinafter referred to as "Uniroyal"),[1] respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 16, 1982.

## OPINIONS BELOW

The Opinion of the Court of Appeals dated February 16, 1982, is not officially reported, but is unofficially reported at 28 FEP Cases 19. A copy is appended hereto as

[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner hereby states that it has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

Appendix A. The Opinion of the District Court for the Northern District of Indiana, South Bend Division, dated March 6, 1981, is reported at 509 F. Supp. 442. A copy is appended hereto as Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was dated and entered February 16, 1982 (Appendix C). Uniroyal's petition for rehearing and suggestion for rehearing *en banc* was denied April 13, 1982 (Appendix D). This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

## STATUTORY PROVISION INVOLVED

The statutory provision involved is Title VII of the Civil Rights Act of 1964, as amended, (hereinafter referred to as "Title VII") 42 U.S.C. § 2000e, *et seq.*, and specifically Section 706(k) thereof (42 U.S.C. § 2000e-5(k)) which provides as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

## STATEMENT OF THE CASE

This case raises questions of significance regarding the nature and type of legal proceedings for which attorneys' fees may be awarded under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* within the meaning of this Court's decisions in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), and *Alyeska Pipe-*

*line Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Moreover, this case concerns the proper standards and criteria which should govern a court of appeals in determining whether a district court abused its discretion in setting an appropriate hourly rate to be used in computing a "reasonable attorney's fee" under Section 706(k) of Title VII.

This is a class action sex discrimination case filed in 1972 in District Court in South Bend, Indiana by female workers who were employed by Uniroyal at its production facility in Mishawaka, Indiana. *Chrapliwy, et al.* v. *Uniroyal, Inc.*, Case No. 72 S 243 (N.D. Ind. 1972) (hereinafter *"Chrapliwy"*). In 1974, the District Court granted the plaintiffs' motion for partial summary judgment on issues of liability. Thereafter the proceedings were delayed due to the death of the presiding district court judge and the resulting vacancy in the district court. Following the judge's death, plaintiffs almost immediately requested the district's chief judge to expedite the case. Plaintiffs were advised that everything humanly possible would be done in this regard despite a heavy backlog of priority criminal cases and a critical shortage of judges in the district.

Still impatient with the delay, in 1975 plaintiffs diverted their attention away from *Chrapliwy* and brought suit against the Secretaries of Labor, Defense and Interior seeking to have Uniroyal debarred from its status as a federal contractor under Executive Order 11246.[2] *Chrapliwy* v. *Dunlop*, Case No. 75-1705 (D.D.C. 1975) (hereinafter *"Dunlop"*). Although plaintiffs made extensive efforts to join

[2] Executive Order 11246 (30 F.R. 12319) prohibits federal contractors from discriminating against employees on the basis of sex, race and other impermissible grounds. A contractor can be debarred from its contracts and declared ineligible for future government contracts in the event of noncompliance with the Order.

Uniroyal as a defendant in this proceeding, Judge Pratt of the District Court for the District of Columbia ruled that Uniroyal could not be made a party inasmuch as the Executive Order created no private action against an employer by an employee.

After plaintiffs and the federal government entered into a stipulation whereby the government agreed to conduct a compliance review of Uniroyal under the Executive Order, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) commenced an administrative action against Uniroyal to debar it as a federal contractor and cancel its existing contracts. *OFCCP* v. *Uniroyal, Inc.*, Case No. 1977-1. Plaintiffs were permitted to intervene in the OFCCP action in their capacity as "interested persons" under the Executive Order.

Uniroyal challenged the validity of the OFCCP's rules and regulations concerning administrative discovery and obtained a temporary restraining order from the District Court which was subsequently dissolved on the grounds that Uniroyal had not exhausted its administrative remedies. *See Uniroyal, Inc.* v. *Marshall*, __ F. Supp. __, 20 FEP Cases 477 (N.D. Ind. 1977) (hereinafter "*Marshall I*"). Plaintiffs were never a party to this proceeding, although plaintiffs' counsel sought compensation for "monitoring" this proceeding.

Forced to contest the validity of the discovery regulations through the administrative process, Uniroyal refused to comply with the OFCCP's discovery requests, and an administrative hearing was held to consider the government's motions to debar Uniroyal for its refusal to comply with discovery. The government's case was presented by a team of five attorneys. Plaintiffs' counsel attended the six days of hearing, but did not present witnesses on their

own behalf or cross-examine witnesses presented by the government or Uniroyal.[3]

Following the Administrative Law Judge's issuance of an order in 1978 recommending Uniroyal's debarment based upon its failure to comply with discovery, Uniroyal filed timely exceptions to the recommended decision with the Secretary of Labor. While the case was under advisement, plaintiffs filed another lawsuit against the Secretary of Labor attempting to force him to issue a Final Administrative Order adopting the recommended decision of the Administrative Law Judge. *Chrapliwy* v. *Marshall*, Case No. 79-1647 (D.D.C. 1979). Once again, Uniroyal was not a party to nor was it involved in this proceeding.

The *Chrapliwy* Title VII action was ultimately settled leaving only the issue of attorneys' fees to be decided by the District Court. Accordingly, plaintiffs made application to the District Court seeking fees in the amount of $4,658,510. After full briefing by the parties and a hearing on the fee issue, the District Court awarded plaintiffs a fee of $833,679. This amount represented a "lodestar" fee of $583,679 based on the compensable hours multiplied by the allowable hourly rates, a $200,000 bonus for the quality of representation and $50,000 for the risks of litigation.[4]

Relying on this Court's decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), the District Court

[3] Plaintiffs' counsel filed a motion in the administrative proceeding seeking to have Uniroyal debarred based on alleged substantive violations of the Executive Order, but the Administrative Law Judge, the Secretary of Labor and the reviewing district court all ruled that the hearing had been limited to the procedural discovery issue. *See Uniroyal, Inc.* v. *Marshall*, 482 F. Supp. 364, 375-376 (D.D.C. 1979) (hereinafter "*Marshall II*").

[4] Uniroyal has already paid plaintiffs' counsel the lodestar fee and the $50,000 fee for the risk of litigation.

rejected plaintiffs' claims for attorneys' fees for participation in the various non-Title VII lawsuits and administrative proceeding described above, specifically *Dunlop, Marshall I, Marshall II, Chrapliwy* v. *Marshall,* and the OFCCP administrative debarment proceeding. The District Court held:

> Several reasons dictate this decision, but, most importantly, the remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment. In this case, the collateral proceedings may have been the proximate cause of the success achieved by the plaintiffs. Success alone, however, does not legitimize a request for fees regarding procedures that were not contemplated under Title VII's attorney's fee provisions. This is made amply clear by the wording of the attorney's fee statute and the cases which have interpreted it. Section 706(k) (42 U.S.C. § 2000e-5(k)) provides:
>
> > In an action or proceedings *under this subchapter,* the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the cost. (emphasis added).
>
> This section requires that the attorney's time and efforts be mandated by the Title VII statute, or by related and required procedures. The emphasized language makes it clear that the attorney's time must be within the Title VII procedure. The Executive Order utilized here cannot be transformed by legal alchemistry into such a proceeding.

Appendix at B-17-18 (emphasis in original).

The District Court also rejected plaintiffs' request for an hourly rate of $175 for their Washington, D.C. lead counsel, allowing instead a rate of $75 which was near the top of the range of hourly billing rates in the South Bend area where the case arose and was litigated.

On appeal, the Court of Appeals increased the lodestar fee nearly threefold to $1,510,768. In computing the fee award, the Court of Appeals granted attorneys' fees for participation in all three of the collateral, non-Title VII court actions and the OFCCP administrative proceedings and created an entirely new standard for determining the scope of activities for which attorneys' fees can be awarded under Title VII. Under the court's test:

> Section 706(k) should be interpreted as allowing attorneys' fees to the prevailing plaintiffs for services which contribute to the ultimate termination of the Title VII action.[5]

The Court of Appeals also reversed the District Court on the issue of what constitutes a reasonable hourly billing rate, allowing plaintiffs' the full $175 rate requested for lead counsel. The Court first acknowledged that "a judge is not required to accept an attorney's valuation of his own time. A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates."[6] However, the Court then went on to find that the District Court had "erred as a matter of law in limiting the hourly rates to local rates in the South Bend area,"[7] even though the District Court had found that the "reasonable attorney's fee" provided by the statute required a "balancing" of requested rates and local billing rates.

The Court of Appeals then remanded the case to the District Court solely for reconsideration of the $200,000 bonus for quality of representation in light of the increased lodestar fee award.

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[5] Appendix at A-13.

[6] Appendix at A-13.

[7] Appendix at A-14.

## REASONS THE WRIT SHOULD BE GRANTED

The decision of the Court of Appeals, if left standing, effectively eliminates the limitation set forth in Section 706(k) that attorneys' fees are only available under Title VII for work performed in an action or proceedings "under this subchapter." If carried to its logical extreme, the decision holds that counsel may be compensated for any activities, whether brought in a legal forum or elsewhere, if such actions contribute to an employer's decision to settle a Title VII suit.

This result conflicts with the general American rule that, absent express statutory authorization, each party pays its own attorneys' fees, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and represents an unwarranted broadening of this Court's decision in the *Carey* case. In *Carey*, this Court held that attorneys' fees could be awarded under Section 706(k) only for participation in proceedings which are mandated or required by the statutory scheme of Title VII. The decision below, however, is authority for an entirely different standard; *viz*, that fees will be available for any services which contribute to the ultimate termination of the Title VII action.

Finally, the decision below fundamentally misconstrues the role of the courts of appeals and the appropriate legal standard for reviewing the exercise of discretion by a district court in assigning reasonable hourly billing rates for attorneys' fee awards under Title VII.

For these reasons the writ should be granted.

## ARGUMENT

### I.

### THE SEVENTH CIRCUIT'S TEST FOR DETERMINING COMPENSABLE HOURS IS CONTRARY TO SECTION 706(k) AS INTERPRETED BY THE COURT IN *NEW YORK GASLIGHT CLUB, INC. V. CAREY.*

Section 706(k) of Title VII provides the necessary statutory authorization for attorneys' fees as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

In *Carey,* this Court held that Section 706(k) authorizes a federal court to allow the prevailing party attorneys' fees "for legal services performed in prosecuting an employment discrimination claim in *state* administrative and judicial proceedings that Title VII requires federal claimants to invoke." 100 S. Ct. at 2027 (emphasis in original). This Court made it abundantly clear that in addition to the federal administrative and judicial procedures established by Title VII, attorneys' fees could only be awarded for work in "the state and local remedies to which complainants are required to resort," because "initial resort to state and local remedies is mandated." *Id.* at 2030, 2031. The Court concluded by again stating that attorneys' fees were only being awarded for work performed in state proceedings "to which the complainant was referred pursuant to the provisions of Title VII." *Id.* at 2034.[8]

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[8] That the holding in *Carey* is strictly limited to statutorily mandated proceedings was further emphasized by Justice Stevens in his concurring opinion:

> All that needs to be decided is whether an allowance of fees may properly cover the work performed in the administrative proceedings that were a *prerequisite* to the court action.

100 S. Ct. at 2035 (emphasis added).

The Seventh Circuit erred in awarding fees for the independent non-Title VII proceedings. *Carey* clearly precludes such fees. None of the five collateral actions was undertaken pursuant to Title VII's carefully constructed enforcement mechanism. None of these actions was either a statutorily required EEOC action or a state agency deferral proceeding, and, as the District Court observed, they "cannot be transformed by legal alchemistry into such a proceeding." Appendix at B-18.[9]

One foreseeable result of the Court of Appeals' decision will be a marked increase in unnecessary and duplicative litigation in the federal courts filed as adjuncts to already-initiated Title VII actions simply to ensure the eventual award of an expanded attorneys' fee. Indeed, under the Seventh Circuit's reasoning, any activity undertaken by counsel which contributes to the termination of the litigation will be deemed compensable activity. For example, attorneys may now logically be awarded fees for such activities as organizing and directing a consumer product boycott which forces an employer to settle a Title VII case.

The anomalous result created by the Seventh Circuit's decision is amply demonstrated by the nature of the non-Title VII collateral proceedings which the decision below brings under the umbrella of Section 706(k) in this case.

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[9] None of the collateral actions has any independent statutory basis for the awarding of attorneys' fees as required by *Alyeska*. All of the collateral actions, with the exception of the debarment proceeding, alleged jurisdiction on the basis of the Administrative Procedure Act. *Chrapliwy* v. *Marshall* and *Chrapliwy* v. *Dunlop* additionally alleged jurisdiction under the mandamus provisions of 28 U.S.C. § 1361. Neither of the cited statutory provisions contain any provision whatsoever for the recovery of attorneys' fees. Similarly, neither Executive Order 11246 nor its implementing Rules and Regulations provide for the awarding of attorneys' fees to any party.

Three years following the commencement of the instant Title VII lawsuit, plaintiffs' attorneys chose to abandon pursuit of the Title VII action and begin a series of non-Title VII court and administrative proceedings.[10] The first such proceeding, *Dunlop,* was a mandamus action against the Secretary of Labor and certain compliance agencies seeking to force them to pursue a contract debarment action against Uniroyal under the Executive Order. Despite the district court's express dismissal of Uniroyal as a defendant in this action, the decision of the Court of Appeals now requires Uniroyal to pay for approximately 1,200 hours of time devoted to this case at a rate of $175 per hour—over $200,000 in attorneys' fees for a case in which Uniroyal was not a party and from whom no relief was or could have been obtained.[11]

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[10] The Court of Appeals asserted that the plaintiffs "at all times pursued their Title VII action." Appendix at A-12. There is no factual basis for this statement, and the District Court expressly held that plaintiffs had abandoned the Title VII action. "[T]he remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. *The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment.*" Appendix at B-17 (emphasis added).

[11] The Court of Appeals for the District of Columbia in a recent case further defined the circumstances under which attorneys' hours are compensable under Section 706(k). In *National Association of Concerned Veterans* v. *Secretary of Defense,* ___ F.2d ___, 28 FEP Cases 1134, 1140 (D.C. Cir. 1982), the court held:

> Fees are not recoverable for non-productive time nor, at least in the context of Title VII and FOIA, for time expended on issues on which plaintiff did not ultimately prevail. (Citing *Copeland* v. *Marshall,* 641 F.2d 880, 892 n.18 (D.C. Cir. 1980) (*en banc*)).

Clearly the *Dunlop* case falls within the above exclusion. Not only was *Dunlop* not part of the *Chrapliwy* lawsuit, but plaintiffs did not prevail against Uniroyal.

The Court of Appeals also awarded fees to plaintiffs' attorneys for "monitoring" the proceedings in *Uniroyal, Inc.* v. *Marshall* Case No. 77-00108 (N.D. Ind. 1977) (*Marshall I*), a lawsuit challenging the validity of certain Department of Labor procedural rules relating to discovery in contract debarment administrative proceedings. Plaintiffs were not a party and did not seek to intervene in this action, and the issues involved were totally unrelated to the substantive allegations of discrimination in the Title VII *Chrapliwy* case. Certainly nothing in this lawsuit contributed in any way to the termination of the substantive Title VII claims. Accordingly, mere "monitoring" of this action cannot be considered a compensable activity.

Finally, there is the contract debarment proceeding itself and the related court cases which followed.[12] Despite the fact that the Executive Order has no provision for attorneys' fees and the federal courts unanimously agree that there is no private right of action under the Executive Order,[13] the Court of Appeals awarded attorneys' fees for the participation by plaintiffs as private litigants in such proceedings.

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[12] The Court of Appeals' apparent assumption that the debarment action dealt with the merits of substantive allegations of sex discrimination is erroneous. Appendix at A-12. The debarment action at no time concerned the issue of whether Uniroyal had violated the Executive Order on its merits. The District Court found that the entire proceeding concerned Uniroyal's failure to abide by pretrial discovery rules and regulations which it considered invalid. Appendix at B-10, citing the decision in *Uniroyal, Inc.* v. *Marshall*, 482 F. Supp. 364, 375-376 (D.D.C. 1979) (*Marshall II*).

[13] *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632-633 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1977); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964).

The Seventh Circuit's decision states that the fact that neither the plaintiffs nor Uniroyal were formal parties in all of the above non-Title VII proceedings is "irrelevant" (Appendix at A-13 n.15) and totally ignores the absence of a private right of action under the Executive Order. However, these factors are critical to the availability of attorneys' fees when judged against the general "American" rule that each party pay its own attorneys' fees. This Court clearly established in *Alyeska* that the express statutory authorization for fee awards is absolutely required as a prerequisite for the awarding of attorneys' fees. Awarding fees for the debarment proceedings, in which there is no provision for either a private right of action or attorneys' fees, is tantamount to creating such a right of action and is contrary to *Alyeska*.[14]

## II.

## THE SEVENTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT REGARDING THE HOURLY BILLING RATE ALLOWED TO PLAINTIFFS' COUNSEL.

Plaintiffs, Uniroyal and the Court of Appeals all agree that the question of attorneys' fees under Title VII is a matter properly left to the discretion of the district courts. Appendix at A-8. Moreover, the fee authorization provision

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[14] The significance of this barrier was not lost on the District Court which held that it would be improper to charge Uniroyal with attorneys' fees for the debarment proceedings absent a private right of action, adding that Title VII and the Executive Order "cannot be fused into one overarching mechanism." Appendix at B-19.

Similarly, the district court in the *Dunlop* case reasoned that Uniroyal could not be joined as a party as this would be tantamount to creating a private right of action.

of Title VII expressly recognizes the discretionary authority of the district courts in such matters.

A district court can only be vested with such discretion when it pertains to pure questions of fact. Accordingly, appellate review of discretionary attorneys' fee awards must be governed by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.[15] In *Pullman-Standard* v. *Swint*, __ U.S. __, 28 FEP Cases 1073 (1982), this Court made it explicitly clear that an appellate court may not arrive at independent findings on questions of fact free of the limitations of Rule 52. In *Swint*, the court of appeals dealt with the question of the discriminatory intent of a seniority system under Title VII, applying a test which required consideration of the totality of circumstances as well as the particular consideration of certain enumerated factors. The appellate court rejected the district court's findings of fact and substituted its own findings. Labeling the actions of the court of appeals "incredible," this Court held that a cursory reference to the controlling standard of Rule 52 would not justify or legitimatize a *de novo* review of factual issues by a reviewing court. 28 FEP Cases at 1081.

The Seventh Circuit has committed the same error as the Fifth Circuit. Although the Court of Appeals purports to be correcting a legal error (Appendix at A-14), its determination of the hourly billing rate to be awarded plaintiffs' attorneys is marked not only by the Court's independent findings of fact but also by findings not sufficiently supported by record evidence.

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[15] Rule 52(a) provides in pertinent part as follows:

> Findings of fact shall not be set aside unless clearly erroneous. . . .

Thus, for example, the Court of Appeals readily accepted the requested hourly rate of $175 per hour for plaintiffs' lead counsel without any evidence in the record that said counsel had ever received such an hourly rate. This finding was contrary to the Court's own stated standard whereby a district court may "approach high rates with skepticism" and thus lower requested billing rates in instances where "an attorney may bill at a high rate but rarely collect at that rate." Appendix at A-13, A-13 n.16.

It is also squarely in conflict with decisions of the Courts of Appeals for the Fifth Circuit and the District of Columbia. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974), the Fifth Circuit held that a party seeking attorneys' fees under Section 706(k) "has the same burden of proving entitlement to an award of attorneys' fees as he would bear the burden of proving a claim for any other money judgement." The D.C. Circuit, which has developed the most extensive standards for attorneys' fee cases,[16] elaborated on the type of factual showing which plaintiffs must make to substantiate a requested billing rate in *National Association of Concerned Veterans* v. *Secretary of Defense.* The court held:

> It is essential to this inquiry that counsel's billing practice be accurately documented. A fee applicant should be required to state the rate at which he actually billed his time in other cases during the period he was performing the services for which he seeks compensation from defendant. ***This rate is not what he would have liked to receive, or what the client paid in a single fortunate case, but what on average counsel has in fact received.***

28 FEP Cases at 1139 (emphasis added).

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[16] *See Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*).

The Seventh Circuit further stated that the "fee customarily charged for similar services in the locality where services are rendered is *doubtless relevant* even where the attorney normally practices elsewhere." Appendix at A-15-16 (emphasis added). Moreover, the Court agreed that the District Court "has discretion to question the reasonableness of an out of town attorney's billing rate" if comparable services at a lower rate are available in the locality where the case is tried. Appendix at A-16.

Having articulated these standards, the Court of Appeals usurped the District Court's discretion to determine the weight to be given local billing rates under these standards. Instead, the Court of Appeals totally ignored local billing rates and made its own independent findings of fact that the requested out-of-town rate should be allowed.

Similarly, the Court of Appeals ruled that the fee customarily charged for similar services in the locality where the attorney normally practices is also a relevant factor. Appendix at A-16. Although this was a factor not considered by the District Court, the Seventh Circuit elected to make its own determination that the rate customarily charged for similar services in the District of Columbia where plaintiffs' lead counsel resides did not require an adjustment of the requested billing rate. This finding was contrary to the only available evidence of customary rates for that locale. Reported cases cited by Uniroyal but ignored by the Court of Appeals suggest that the hourly rates awarded by the District Court were customary not only for the locality where counsel normally practiced but the locality where the case arose and was litigated. *See, e.g., Williams* v. *Boorstin*, __ F. Supp. __, 20 FEP Cases 1539, 1540 (D.D.C. 1979) (hourly rate of $75 described as "within the top range of charges for this type of work [Title VII] in this community" and awarded to counsel described by the court as "highly skilled in this field where he has had

wide experience and received growing recognition."); *Snead* v. *Harris*, __ F. Supp. __, 25 EPD ¶ 31,581 (D.D.C. 1981) (same attorney awarded hourly rate of $80 in 1981 and recognized as "an experienced and capable Title VII lawyer.").[17]

Even assuming, *arguendo*, that the Court of Appeals was correct in stating that the District Court erred as a matter of law in "limiting" the hourly rate available to plaintiffs' counsel, the Seventh Circuit nevertheless erred in making its own factual findings under the legal standard it enunciated. As this Court observed in *Swint*, it is elementary that the proper action by the reviewing court in such a case is to remand for further proceedings consistent with the legal standards established by the court of appeals.

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual role is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . .
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

28 FEP Cases at 1081.

Here the factual issues which the Seventh Circuit unilaterally resolved were capable of many variations. At a minimum, the District Court should have been permitted to determine (1) the normal billing rate for comparable legal

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[17] As the court observed in *National Association of Concerned Veterans* v. *Secretary of Defense:*

> Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate.

28 FEP Cases at 1139.

services in Washington, D.C., and (2) whether plaintiffs' lead counsel had ever collected the requested hourly rate.

Finally, this case permits the Court to set forth the standards or criteria by which reasonable hourly rates for attorneys' fees under Title VII should be determined. This Court has never addressed this issue, although various courts of appeals have attempted to do so. *See Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*). While stringent and fixed standards might unduly restrict the ability of the trial courts to consider the totality of the case in setting fees, some guidance is needed to eliminate the proliferation of inconsistent, ad hoc attorneys' fee determinations emanating from the district courts. As it presently stands, significant fluctuations in the hourly rates awarded to counsel will occur between the various circuits. For example, district courts in the Eighth Circuit are instructed that when setting reasonable hourly rates in fee awards cases, they should apply "the rates charged by attorneys of like skill and for similar work *in the general locality in which the litigation takes place.*" *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305, 1313 (8th Cir. 1981) (emphasis added).[18] However, the decision below specifically reversed the District Court for its reliance upon local billing rates.[19]

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[18] *Compare* the "reasonable attorney's fee" provision of the Consumer Product Safety Commission Improvement Act of 1976 which similarly provides that hourly billing rates should be based upon "the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee." 15 U.S.C. § 2059(e)(4).

[19] Significantly, the District Court's decision was based upon the affidavits submitted by Uniroyal of prominent trial attorneys from South Bend. This is precisely the nature of evidence which the

This inconsistency, and the Seventh Circuit's standard in particular, works an injustice on the defendant in a fee award case when it burdens a defendant with above average hourly rates to which the defendant has never consented, as is normally the case in the matter of legal fees. The fee-shifting requirement present in Title VII fee determination cases results in defendants being required to pay a fee to an attorney with whom they had no relationship except adversarial. The defendants have no ability to control or even monitor the actions, expenses or fees of opposing counsel.

The decision of the Seventh Circuit opens the door for *de novo* appellate review of the hourly billing rate awarded in thousands of discrimination cases brought under Title VII and related statutes. Such determinations of the district courts must be subject to the "clearly erroneous" standard of Rule 52(a) to avoid the unnecessary volume of attorney fee disputes which are coming before the courts of appeals. *See National Association of Concerned Veterans* v. *Secretary of Defense*, 28 FEP Cases at 1143 n.18.

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D.C. Court of Appeals suggests is relevant in *National Association of Concerned Veterans* v. *Secretary of Defense:*

> An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate information. On the other hand, generalized "information and belief" affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice.

28 FEP Cases at 1138-1139.

In contrast, the only affidavits proffered by plaintiffs in support of their requested rates came from non-practicing attorneys who merely urged the awarding of the requested rates without any justification for such rates.

## CONCLUSION

For the reasons stated above, Uniroyal respectfully requests this Court to grant its petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

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Nos. 81-1557 & 81-1633

ALTA CHRAPLIWY, et al.,

*Plaintiffs-Appellants and Cross-Appellees,*

*v.*

UNIROYAL, INC., a corporation,

*Defendant-Appellee and Cross-Appellant.*

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Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S72-C-0243—Robert A. Grant, *Judge.*

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ARGUED OCTOBER 1, 1981—DECIDED FEBRUARY 16, 1982

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Before CUMMINGS, *Chief Judge,* FAIRCHILD, *Senior Circuit Judge,* and BROWN, *Senior District Judge.*[*]

FAIRCHILD, *Senior Circuit Judge.* The plaintiffs in this case are female workers who were employed by the defendant. In 1972, they filed a class action under Title VII of the Civil Rights Act of 1964, alleging that the defendant had engaged in the practices of segregated hiring and seniority rosters.

In 1979, the parties reached a settlement favorable to the plaintiffs, amounting to $9,318,000 in cash and pen-

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[*] Senior District Judge Wesley E. Brown of the District of Kansas sitting by designation.

sion benefits, in addition to reinstatement of 296 terminated class members to active employment with full seniority. The defendant also agreed to pay attorneys' fees to the plaintiffs, in an amount to be established by the district court.

Accordingly, the plaintiffs applied to the district court for an allowance of attorneys' fees pursuant to Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), with an initial amount of $1,510,768 for the number of hours worked times the hourly rates for the plaintiffs' eleven attorneys. The plaintiffs also sought additional allowances for the risks of litigation and quality of representation.

The district court allowed a fee of $833,679, which included an initial amount of $583,679 for hours times hourly rates, $50,000 for the risks of litigation, and $200,000 for the quality of representation.

The plaintiffs have appealed this fee award, claiming that the district court erred in lowering the hourly rates and number of hours worked. The plaintiffs further claim that the district court abused its discretion in awarding only $250,000 for risk and quality. The defendant has filed a cross-appeal, challenging only the additional $250,000 awarded for risk and quality as too generous.

Thus, the issues raised by this appeal concerning the district court's award of attorneys' fees to the prevailing plaintiffs, pursuant to Section 706(k), 42 U.S.C. § 2000e-5(k), are as follows:

1. Did the district court err in concluding that as a matter of law it was required to refuse to award attorneys' fees to the prevailing plaintiffs for time spent persuading the federal government to debar the defendant from its federal contracts on account of discrimination in employment, although these efforts by the plaintiffs led to the settlement of the Title VII action?

2. Did the district court err in concluding that as a matter of law it was required to lower the hourly

rates customarily charged by the plaintiffs' attorneys to rates within the range of hourly rates customarily charged by attorneys in the locality where the district court sits?

3. Did the district court abuse its discretion in awarding to the plaintiffs additional fees of $50,000 for the risks of litigation and $200,000 for the quality of representation?

We find that the district court erred in concluding that as a matter of law it was required to refuse to award attorneys' fees for the time spent by the plaintiffs persuading the federal government to debar the defendant from its federal contracts. We also find that the district court erred in concluding that as a matter of law it was required to lower the hourly rates customarily charged by the plaintiffs' attorneys to rates customarily charged by attorneys in South Bend, Indiana, where the district court sits.

We find that the district court did not abuse its discretion in awarding $50,000 for risks and $200,000 for the quality of representation. However, in light of our conclusions as to the initial amount determined by the district court, it will be necessary that on remand the district court also reconsider the award of $200,000 for quality.

## *I. FACTS*

The plaintiffs brought a class action in 1972 pursuant to Title VII of the Civil Rights Act of 1964 on behalf of all female workers employed by the defendant at its plastics plant in Mishawaka, Indiana. The plaintiffs challenged the defendant's system of segregated hiring and seniority. In July of 1973, the district court granted the plaintiffs' motion for partial summary judgment on issues of liability, based on the defendant's continued failure to respond to requests for admissions. This decision established the defendant's general liability for sex discrimination. *See Chrapliwy v. Uniroyal, Inc.*, 509 F.Supp. 442, 445 (N.D. Ind. 1981).

In October of 1974, Judge Beamer, who had been handling the case, died. His death and the resulting vacancy on the district court delayed further proceedings.

Time was passing, and there was further delay. It appeared that defendant was taking advantage of the situation, and doing nothing to provide relief for members of the plaintiff class. Beginning in 1975, plaintiffs sought to obviate further delay in the Title VII action by attempting to persuade the federal government to notice defendant's discriminating practices which were the subject of the Title VII action and to take action against defendant based on such discrimination.[1] These activities resulted in several court and administrative proceedings, involving the plaintiffs, the defendant, and the Departments of Labor, Defense, and the Interior. *See Chrapliwy, supra*, 509 F.Supp. at 445-448.

The defendant first attempted to use the Title VII action to stave off the government's investigation under Executive Order 11246. The Department of the Interior had issued a deficiency letter to the defendant, and the defendant's response was that since the Title VII suit was underway, it was already defending itself against the same charges of discrimination. The Department initially agreed to defer action pending the outcome of the Title VII suit, but began an active investigation of the defendant's possible violation of Executive Order 11246 when the plaintiffs continued to press the government to act. *See Chrapliwy, supra*, 509 F.Supp. at 445-446.

In February of 1976, the defendant moved to dismiss the Title VII action, claiming that the plaintiffs' pursuit of relief through enforcement of Executive Order 11246 amounted to misconduct.[2] The court denied the motion,

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[1] Executive Order 11246 prohibits federal contractors from discriminating against employees on the basis of sex, race, or other impermissible grounds. The contractor can be debarred from its contracts and declared ineligible for future contracts in the event of noncompliance with the Order.

[2] *See Chrapliwy, supra*, 509 F.Supp. at 461.

upholding the plaintiffs' right to pursue the defendant's debarment, which involved issues identical to the basic issues in the Title VII action itself.[3] The court noted that "[a]s representatives of the class, [the plaintiffs] were charged with the responsibility of initiating what ever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal."[4]

In October of 1979, less than one week before the defendant was to lose a large federal contract as a result of the government's investigations of a violation of Executive Order 11246, the parties settled the Title VII action. The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. *See Chrapliwy, supra*, 509 F.Supp. at 451. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near. *Id.*

In making the award of attorney's fees, the district court first determined that it should calculate fees by the "lodestar" method. *Id.*, at 449-450.[5] The court evi-

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[3] *See id.* 466.

[4] Unpublished Memorandum of June 8, 1976, Joint Appendix, 175, 177.

[5] The method for determining a "lodestar" amount is to multiply the allowable hours worked by a reasonable hourly rate for each attorney. This "lodestar" amount may then be raised or lowered to recognize other factors. Various courts of appeals have adopted the "lodestar" method. *See, e.g., Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2nd Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

This court has never expressly adopted the "lodestar" method as such. We have, however, approved a method of calculating fees which approximates the "lodestar" approach. In *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), and,

(Footnote continued on following page)

dently found that the number of hours requested by the plaintiffs had been reasonably expended, reducing those hours only to the extent necessary to preclude the plaintiffs from receiving attorneys' fees for the hours spent in persuading the federal government to debar the defendant from its federal contracts. Likewise, the court evidently determined that the hourly rates requested by the plaintiffs were reasonable, ranging from $200 and $175 per hour for counsel from New York and Washington, D.C., respectively, down to $50 to $70 per hour for counsel from around the South Bend area, where the district court sits. The court noted that:

> The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. It would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys. If Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting [plaintiffs] to the local billing rate. . . . The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale.

*Chrapliwy, supra*, 509 F.Supp. at 456.

The district court further decided to use present instead of historical billing rates, to offset inflation

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[5] *continued*

more recently, in *State of Ill. v. Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981), we approved of using "hours times billing rate" as a convenient starting point in determining a fee award "from which adjustments can be made for various other elements." *Waters, supra*, 502 F.2d at 1322.

which had increased the price levels above those in effect at the time the suit was instituted in 1972.[6]

After determining that the rates and hours were reasonable, however, the district court decided that the requested billing rates had to be "balanced" against the local billing rates in the South Bend area. *Id.*, at 456-457. Based on affidavits submitted by the defendant, the court found that the local rates ranged from a low of $35 per hour in 1973 to $85 per hour in 1980, depending, however, on the skill of the attorney. *Id.*, at 455.

Although the court referred to "balancing" the rates requested by the plaintiffs against the local rate, the court in fact limited the plaintiffs to a local rate. *Id.*, at 458-459. The court set rates ranging from $75 per hour for counsel from Washington, D.C. and New York to $50 per hour for others. *Id.*

The district court excluded all hours spent by the plaintiffs to persuade the federal government to enforce Executive Order 11246 and debar the defendant from its federal contracts. The court determined that the statutory language of Section 706(k) and the holding in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) precluded an award of fees for such work. *Id.*, at 451-453.

After determining the basic fee of allowed hours times allowed rates, amounting to $583,679, the district court evaluated the factors listed in *Waters, supra*, 502 F.2d at 1322, for determining the reasonableness of a fee. Accordingly, the court raised the basic fee by $50,000 for risk and $200,000 for the quality of representation. *Id.*, at 459-462.

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[6] The court noted that the Consumer Price Index for October 1972 was 126.6. In July, 1980 it was 248, an increase of 95% over eight years. *Chrapliwy, supra*, 509 F.Supp. at 457. Compensation for delay might have been achieved by computation of interest, a percentage allowance for inflation, or a similar allowance in choosing a so-called multiplier. No party seems to challenge the device the court used.

## *II. HOURS REASONABLY EXPENDED*

In general, a district court's award of attorneys' fees will only be reversed if the court abused its discretion.[7] Error of law, however, is also a ground for reversing what would ordinarily be a discretionary ruling.[8] If a judge erroneously thought the law required him to do what he did, the judge did not exercise discretion.

We are also mindful of the congressional goal of eliminating discriminatory practices in employment by encouraging private litigants who are injured by such practices to bring Title VII actions. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978).[9] Congress intended to encourage these private litigants to hire counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendants would be likely to assert. *Id.*, at 419.

As we have stated before, in *Waters*, *supra*, 502 F.2d at 1322, and *State of Ill. v. Sangamo Construction Co.*, *supra*, 657 F.2d at 855, 862 (7th Cir. 1981), the convenient starting point for determining a reasonable fee award is to multiply "the reasonable hours devoted to the litigation [by] the reasonable billing rate for that work." *Sangamo Construction Co.*, *supra*, 657 F.2d at 862. Once that basic fee is determined, it may be adjusted upward or downward, based on the elements outlined in *Waters*, if necessary to arrive at a reasonable fee.[10]

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[7] *See, e.g., Waters, supra*, 502 F.2d at 1322; *Mirabal v. General Motors Acceptance Corporation*, 576 F.2d 729, 730 (7th Cir. 1978); *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980).

[8] *See, e.g., Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 162 (7th Cir. 1981).

[9] *See also Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

[10] This mode of analysis established in *Waters* is similar to the "lodestar" method discussed *supra*, at footnote 3.

(Footnote continued on following page)

The first step in the analysis outlined in *Waters* and *Sangamo Construction Co.* is to determine the number of hours reasonably expended to obtain relief in the action. It is recognized that a judge, from experience, is sufficiently informed so that he may exercise some discretion in deciding that the requested number of hours was not reasonably expended.[11] In this case, counsel for each party worked approximately 11,000 hours. This similarity of hours expended would make it difficult to reduce the plaintiffs' claim of hours spent on that ground, and the district court did not do so.

The district court did, however, reduce the plaintiffs' requested hours to preclude recovery for their efforts to persuade the federal government to debar the defendant from its federal contracts. The court determined that *Carey, supra*, and Section 706(k) of Title VII precluded

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[10] *continued*

Other recent decisions of this court are consistent. In *Mills v. Eltra, Appeal of Ratner*, 663 F.2d 760, 763 (7th Cir. 1981) the court allowed a fee computed by multiplying the number of hours reasonably expended by 150% of the applicant's normal billing rate. The higher rate was used as a multiplier because the case was considered a contingent fee case. Slip op., p. 7.

In *Syvock v. Milwaukee Boiler*, 665 F.2d 149, 162-165 (7th Cir. 1981) we held that the district court applied *Waters* without abuse of discretion in determining initially the number of compensable hours and in refusing an additional 25% on account of the contingent character of the arrangement. We held, however, that the judge erred in a further reduction of hours because plaintiff did not succeed on all elements of his claim, and we directed an increase in the fee to correct that error.

[11] For example, an attorney may overstate his hours mistakenly, through faulty records. There may be duplication of services by two attorneys. The attorney may have devoted time inefficiently or have otherwise accumulated a number of hours beyond those reasonably required for the case.

an award for these hours. In this respect, we think the court erred.[12]

In *Carey*, the plaintiff first filed a claim of discrimination with the EEOC. The EEOC, as required by Title VII, deferred to the proper state administrative agency. When the EEOC later issued a right to sue letter, the plaintiff filed a Title VII action in federal court. A settlement was reached in the state proceedings, so the Title VII action was voluntarily dismissed, with the exception of the petition for attorneys' fees.

The Supreme Court held that Section 706(k) of Title VII authorized "an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." *Carey, supra*, 447 U.S. at 71.

The district court interpreted *Carey* as requiring the exclusion of fees for services related to "collateral proceedings" except when those proceedings are mandated by Title VII. *Chrapliwy, supra*, 509 F.Supp. at 452. The court concluded that the various actions taken by the plaintiff to persuade the government to debar the defendant were not "mandatory procedures" and consequently counsel's services therein could not be compensated, based on the rule in *Carey*. *Id.*

The services at issue in *Carey* were performed in the course of state proceedings. The Title VII action produced little except the award of attorney's fees. The Supreme Court decided that the statute authorized an allowance in a Title VII action for services rendered

[12] If the district court had first decided that the award of attorneys' fees for the plaintiffs' efforts to have the defendant debarred from its federal contracts could be granted as a matter of law but then for some reason determined that such an award should not be granted based on special circumstances of the case, then our task would be to ask first whether the court erred as a matter of law in determining that such fees could be granted and second whether the court abused its discretion in refusing to award such fees.

and results obtained primarily outside of the Title VII action, in state court and administrative proceedings.

The case before us is substantially different from *Carey*. The Title VII action was well underway when the plaintiffs began activities regarding the defendant's debarment. Class certification had been granted; discovery had begun; and partial summary judgment had been granted in favor of the plaintiffs as to the defendant's liability. The defendant delayed in responding to discovery requests. Judge Beamer's death caused further delays. Time was passing, and the plaintiffs sought an efficacious way to bring about an end to the Title VII action with relief for all class members. The plaintiffs' pursuit of the defendant's debarment was a viable avenue for obtaining such relief, because the issues and factual background were the same for both the Title VII action and the enforcement of Executive Order 11246.[13]

The plaintiffs' efforts proved successful. The perseverance of the plaintiffs in their efforts to persuade the government to debar the defendant from its federal contracts led directly to the settlement of the Title VII action.

In responding to the defendant's motion to dismiss the Title VII action because of the plaintiffs' efforts to have the defendant debarred, the district court noted that the plaintiffs were carrying out their responsibilities as representatives of the class in doing whatever was necessary to vindicate the rights of the class against the discriminatory employment practices of the defendant.[14] Thus, the district court recognized that the plaintiffs pursued the debarment of the defendant for the purpose of achieving their ultimate goal of relief in the Title VII suit. We do not read *Carey* as precluding an award of attorney's fees for such efforts.

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[13] Unpublished Memorandum of June 8, 1976, Joint Appendix, 175, 176.

[14] *Id.*, at 177.

If *Carey* has any application to the particular question before us, it is in indicating that the statute should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court. The Supreme Court expressly recognized that a liberal view toward fees would further Congress' goal of "[making] it easier for a plaintiff of limited means to bring a meritorious suit." 447 U.S. at 63, *quoting Christiansburg Garment Co., supra*, at 420.

The district court further decided that the language of Section 706(k), apart from *Carey*, prohibited including compensation for plaintiffs' efforts to have the defendant debarred from its federal contracts. *Chrapliwy, supra*, 509 F.Supp. at 451. Section 706(k) permits a fee award "In any action or proceeding under this subchapter. . . ." The district court read this language as requiring "that the attorney's time and efforts be mandated by the Title VII statute, or by related and required procedures" and his "time must be within the Title VII procedure." *Id.*

We think this interpretation of Section 706(k) is too narrow. The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate dispostion. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action.

We therefore conclude that neither Section 706(k) nor the *Carey* interpretation thereof precludes an award of attorneys' fees to the prevailing plaintiffs for their efforts in persuading the federal government to enforce Executive Order 11246. Rather, Section 706(k) should be interpreted as allowing attorneys' fees to the prevail-

ing plaintiffs for services which contribute to the ultimate termination of the Title VII action.[15]

## *III. REASONABLE BILLING RATE*

The second step in the analysis outlined in *Waters* and *Sangamo Construction Co.* for determining an award of reasonable attorneys' fees is to determine the reasonable billing rate.

From the outset, we recognize that a particular attorney may have special skills or experience which raise the value of his time above the value of another attorney's time. However, here again, as with hours, a judge is not required to accept an attorney's valuation of his own time. A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates.[16]

In the case before us, the district court evidently determined that the hourly rates requested by the plaintiffs for each attorney were reasonable. *Chrapliwy, supra*, 509 F.Supp. at 455-456. The court noted that the defendant's attorneys billed the defendant at rates comparable to the hourly rates sought by the plaintiffs. Furthermore, the court noted that the caliber of counsel

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[15] *Accord, Kulkarni v. Alexander*, 22 FEP Cases 1470, 1477 (D.C. Cir. 1978). *See also Sullivan v. Bureau of Vocational Rehab.*, ..... F.2d ..... (3rd Cir. 1981); *Porter v. District of Columbia*, 502 F.Supp. 271 (D.D.C. 1980). *Cf. Kennedy v. Whitehurst*, 509 F.Supp. 226 (D.D.C. 1981). We note that the fact that neither the plaintiffs nor the defendant were formal parties in all of the "collateral proceedings" is irrelevant to our conclusion. The plaintiffs and defendant were parties in the Title VII action, and we have concluded that the plaintiffs' activities regarding debarment contributed to the outcome of the Title VII action.

[16] For example, an attorney may be overqualified for particular services which could reasonably be performed by a less skilled or experienced attorney or by a lay person. In such a case, it may be unreasonable to value the attorney's time at his regular billing rate. Or, an attorney may bill at a high rate but rarely collect at that rate.

for each side was equally matched. Both sides utilized the services of widely recognized attorneys. Finally, the court noted that the congressional policy of Section 706(k) would not be advanced by arbitrarily limiting the plaintiffs' attorneys to a "local" billing rate when the defendant utilized equally expensive and equally talented attorneys. *Id.*

The court decided, however, that "the plaintiffs' attorneys' billing rate must, of course, be balanced against the local billing rate to achieve the reasonable rate required by the statute." *Id.*, at 456. The local rates in the South Bend area were found to be approximately $85 per hour in 1980. *Id.*, at 455. In "balancing" local rates with the plaintiffs' requested rates, the court actually limited the rates to local rates. The court lowered the rate of lead counsel from Washington, D.C. from $175 per hour to $75 per hour; and the rates of other New York and Washington counsel from $200 to $75, $110 to $50, and $175 to $75.[17]

We think the court erred as a matter of law in limiting the hourly rates to local rates charged in the South Bend area.

If a high priced, out of town attorney renders services which local attorneys could do as well, and there is no other reason to have them performed by the former, then the judge, in his discretion, might allow only an hourly rate which local attorneys would have charged for the same service. On the other hand, there are undoubtedly services which a local attorney may not be willing or able to perform. The complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally.

In our case, the district court did not question the reasonableness of the hourly rates requested by the plaintiffs. The court recognized that the defendant availed itself of counsel charging rates comparable to the rates

[17] The rates of local assisting counsel were reduced without explanation.

requested by the plaintiffs.[18] The court did not indicate skepticism over the need for out of town counsel. In fact, the court recognized that Congress intended to encourage plaintiffs to employ counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendants would most likely assert.

The district court's discussion of "local billing rates versus the attorney's usual billing rate" is set forth in 509 F.Supp. at 455-457. In treating the *Waters* listing of "The fee customarily charged in the locality for similar legal services" as a factor to be considered, the court seems to have read "locality" as "locality where the cause is heard."

The fee customarily charged for similar services in the locality where services are rendered is doubtless relevant even where the attorney normally practices

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[18] The defendant has argued that comparing the rates charged by its attorneys with those charged by the plaintiffs' attorneys is improper. We reject this argument. The rates charged by the defendant's attorneys provide a useful guide to rates customarily charged in this type of case. Also, when the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists. *See North Slope Borough v. Andrus*, 515 F.Supp. 961 (D.D.C. 1981). Such a comparison of rates does not conflict with this court's holding in *Mirabal, supra*, 576 F.2d at 730-731. In that case, the plaintiff recovered $2,000 under the Truth in Lending Act, and then requested a fee of $30,000, arguing that such a fee was reasonable because the defendant's attorney received a similarly high fee. This court held that a fee award in excess of the judgment would require circumstances not present in the case, and that granting large fee awards for small injuries would encourage litigation not in the interests of clients or the public. This court noted that determining the plaintiff's fee based on the fees charged by the defendant's attorney may have little relevance to the value which the plaintiff's attorney provided in the case. In the case before us, however, we suggest that the hours and hourly rates charged by the defendant's attorneys provide a helpful guide in determining whether similarly high rates and hours requested by the plaintiffs were reasonable.

elsewhere. On the other hand the *Waters* list of factors comes from American Bar Association Disciplinary Rule 2-106, which begins with a prohibition against charging clearly excessive fees. In that context the fee customarily charged for similar services in the locality, if different, where the attorney normally practices is also relevant. Pertinent questions where, as here, a court is fixing a fee to be paid by an opponent are whether services of like quality are truly available in the locality where the services are rendered, and whether the party choosing the attorney from elsewhere acted reasonably in making that choice. There is no suggestion that the district court would have answered either of these questions adversely to plaintiffs.

Attorneys with specialized skills in a narrow area of law, such as admiralty law, patent law, or antitrust and other complex litigation, tend to be found in large cities, where an attorney may have a greater opportunity to focus on a narrow area of law. As a specialist, the attorney will usually charge more for performing services in his area of expertise than a general practitioner will charge for performing similar services. Furthermore, the costs of practicing law will vary from city to city, and such costs will be reflected in the rates of the attorneys.

We think that a judge, in allowing an attorney's fee under Title VII or similar statute, has discretion to question the reasonableness of an out of town attorney's billing rate if there is reason to believe that services of equal quality were readily available at a lower charge or rate in the area where the services were to be rendered.

If, however, a party does not find counsel readily available in that locality with whatever degree of skill may reasonably be required, it is reasonable that the party go elsewhere to find an attorney, and the court should make the allowance on the basis of the chosen attorney's billing rate unless the rate customarily charged in that attorney's locality for truly similar services is deemed to require an adjustment.

In any event, "The fee customarily charged in the locality" remains one of a number of factors to be considered as guides, and nothing in *Waters* or the Disciplinary Rule makes that factor an overriding limitation.

Although the district court seems to have disclaimed limiting counsel to South Bend rates, it appears that that in fact happened, without any suggestion that the choice of counsel was improvident or counsel's billing rates were out of line with those charged by available counsel of similar expertise, otherwise similarly situated. We conclude there was error. In our view the allowance should have reflected the billing rates as requested. It follows that when the number of hours, as restored, are multiplied by the billing rates requested, the initial amount determined will be close to the $1,510,768 for which plaintiffs contend, subject to minor adjustments.[19]

## *IV. RISK AND QUALITY*

The third and final step in the analysis of determining an award of reasonable attorneys' fees is to evaluate the eight guidelines listed in *Waters*, *supra*, 502 F.2d at 1322, which in some cases may require an adjustment, upward or downward, of the basic fee of hours times hourly rate. In this case, the district court adjusted the basic fee awarded to the plaintiffs upward, to allow an extra $50,000 for risk and $200,000 for quality of representation. Both the plaintiffs and the defendant challenge this extra award as an abuse of the trial court's discretion, the plaintiffs claiming that the award is low, and the defendant claiming that the award is high.

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[19] The district court's opinion includes a table which states the requested hours and requested rates for the plaintiffs' attorneys' fees. *See Chrapliwy*, *supra*, 509 F.Supp. at 458-459. The plaintiffs have included a similarly constructed table in their reply brief, but the hours requested are different in number from the hours shown on the district court's table. We leave to the district court the task of determining the need for any adjustments in these numbers.

The district court explained in detail its reasons for granting this extra award above the basic fee. First, the court noted that the plaintiffs' attorneys worked for seven years without compensation. Their fees were contingent on the outcome of the litigation. They invested over 11,000 hours, plus expenses, in this risk. They faced a long and difficult battle against equally talented attorneys for the defendant, "no ground was surrendered without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement." *Chrapliwy, supra*, 509 F. Supp. at 460. Fifty thousand dollars to account for the risks involved in representing the plaintiffs on a contingent basis in a complex class action is a modest, if not meager, award.

The plaintiffs claim that the risks were substantially greater than the district court recognized, while the defendant claims that the plaintiffs faced relatively no risks after the initial summary judgment in July of 1973. The allowance of $50,000 for risk reflects the district court's careful evaluation of the facts, and though the allowance is meager, we cannot say the district court abused its discretion in fixing the amount.

Second, in awarding $200,000 for quality, the court found that the plaintiffs' attorneys brought to this litigation experience, reputation, and ability in handling complex cases, particularly the ability to handle Title VII cases. The court determined that the results obtained for the plaintiffs, after years of opposing the talented, nationally recognized law firms representing the defendant, demonstrated these abilities. Indeed the total recovery was substantial, some $9,000,000, cash in part and value of benefits in part, as well as reinstatement of nearly 300 employees. The court also noted that one of the results obtained was that the "actions of the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures." *Chrapliwy, supra*, 509 F.Supp. at 462.

The district court's consideration of quality was appropriate, and the court carefully evaluated its reasons for allowing the extra $200,000 for quality. However, we have determined that the plaintiffs should be awarded a basic fee which reflects the requested hourly rates of each attorney. The hourly rates for the plaintiffs' out of town counsel are higher than rates charged by attorneys in the South Bend area. The reason for allowing the higher rates is that the nature of the case commanded the expertise of attorneys with specialized skills in handling complex litigation and Title VII cases. These experts charge higher fees than local attorneys because of the quality of representation they provide in their area of expertise. Thus, the hourly rates to be allowed by the district court on remand of this case seem to include some of the elements considered in the court's quality award, so that the $200,000 awarded by the district court for quality may overlap with the quality factor implicit in the hourly rates.

Furthermore, we have determined that the plaintiffs are to be awarded attorneys' fees for their efforts in persuading the government to debar the defendant from its federal contracts. The district court seems to have included something for these efforts in the award for quality. The district court should determine on remand whether there is any duplication.

As a result of these possible overlaps, we direct that on remand the court should, if it finds unfair duplication in the award for quality, make an appropriate adjustment.

## *V. CONCLUSION*

Insofar as the district court's judgment limited recovery of attorneys' fees for the prevailing plaintiffs to $583,679 for the basic fee of hours times hourly rates, and insofar as it reflected an additional $200,000 for quality, it is reversed, and the cause remanded for further proceedings consistent with this opinion. In all other respects the judgment is AFFIRMED. Circuit Rule 18 shall not apply on remand. Costs of appeal, including attorneys' fees, are allowed to appellants.

The district court is directed to determine the amount of fees to be awarded to the plaintiffs for the services of their attorneys in this appeal. Although the plaintiffs have not prevailed on all issues argued, we consider the time spent to address issues on which they have not prevailed to have been reasonably expended.[20]

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

[20] *See Syvock, supra*, 665 F.2d at 164.

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## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

| | |
|---|---|
| ALTA CHRAPLIWY, et al., *Plaintiffs,* v. UNIROYAL, INC., et al., *Defendants.* | CIVIL NO. 72 S 243 MEMORANDUM |

### Introduction

The award of attorney fees in this case represents the final question in a suit that has continued for seven years. This litigation resulted in a settlement between the parties providing that defendant Uniroyal, Inc., (Uniroyal), pay 526 women in the plaintiff class $4,758,000 in cash, and approximately an equal amount in future pension benefits on account of unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964. In addition to this monetary relief, Uniroyal must also reinstate 296 class members to active employment with full seniority, and improve the position of women workers generally through changes in the employment system at the defendant's Mishawaka plant.

As a further part of the settlement, Uniroyal agreed to pay plaintiffs' attorneys' fees in the "amount awarded" by the court, subject, of course, to any later appeal, as provided in Section 706(k), 42 U.S.C. § 2000(e)-5(k) which states:

> In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing

> party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

Petitioners are, of course, the prevailing parties within the meaning of Section 2000(e)-5(k). *See Maher* v. *Gagne*, 100 S.Ct. 2570, 2575 (1980).

It now becomes the duty of this Court to determine what is a "reasonable fee" within the meaning of Section 2000(e)-5(k). The reasonable fee must reflect the long history of this litigation, as well as a consideration of the congressional policies underlying Title VII.

## I. *Factual Background*

After passage of the Civil Rights Act of 1964 making sex discrimination unlawful, Uniroyal continued to maintain a segregated hiring and seniority system at its Mishawaka plant where women were heavily employed in the footwear production division, while other lines had predominantly male employees. From 1968-1970, Uniroyal shut down its footwear production, while continuing its other production divisions, throwing a disproportionate number of women out of work. Despite the considerable plant seniority of many women employees, they were not given a chance to "bump" less senior male workers from other production lines.

In November and December of 1969, Uniroyal mailed a form letter to 260 laid-off female employees notifying them that inasmuch as the prospects of their being recalled were "remote", the company was declaring their layoffs permanent and, as a result, was cutting off their supplemental unemployment benefits.

In January, 1970, Alta Chrapliwy and other female workers at the Mishawaka plant filed charges with the Equal Employment Opportunity Commission, (EEOC). The

EEOC investigation found reasonable cause to believe discrimination had taken place, and after conciliation failed, the EEOC issued a right to sue letter.

*1972—1974*

On November 28, 1972, a complaint was filed by the 26 named plaintiffs as a class action on behalf of all female workers employed at Uniroyal's Mishawaka plant. Included as defendants were Uniroyal, Local 65 of the United Rubber Workers (Union), and the United Rubber Workers International. Uniroyal sought dismissal of this complaint, which was denied, and the plaintiffs began discovery proceedings with interrogatories and request for production of documents.

Although Uniroyal delayed its response, the Union complied with the discovery requests. Based upon this information, plaintiffs then drafted requests for admissions from Uniroyal. When Uniroyal failed to respond, plaintiffs filed a motion for sanctions and partial summary judgment on liability issues. The then active Judge of this Court, Judge George N. Beamer, deemed the requests for admissions to be admitted due to Uniroyal's continued failure to respond. It was this decision, in July, 1974, that established the company's general liability for sex discrimination. Uniroyal's motion to vacate this partial summary judgment was denied.

Following this, other requests for admissions detailing the discriminatory employment system were admitted by Uniroyal. Class action certification had previously been granted. Another plaintiffs' motion for partial summary judgment was pending when, on October 21, 1974, Judge Beamer died. His death and the resultant vacancy on this Court delayed proceedings in the case. Uniroyal did not reply to the September, 1974 summary judgment motion until August, 1976. Although Uniroyal's violation of Title

VII had been judicially determined, Uniroyal did nothing in the interim to provide relief for members of the plaintiffs' class.

*1975—1976*

In early 1975, plaintiffs began investigating Uniroyal's compliance status with Executive Order No. 11246. That Executive Order provides that federal contractors shall not discriminate against employees on the basis of their sex, race or other impermissible basis. In the event of noncompliance, the government contractor could be declared "ineligible" for any further contracts. The Secretary of Labor was given the power to enforce that Order and to order debarment, as well as the authority to implement such Order with appropriate federal regulations.

Uniroyal is one of the federal government's largest contractors, with approximately half a billion dollar's worth of Defense Department contracts during the 1969-1974 period. Each time it entered a federal contract, Uniroyal signed the required assurances of its compliance with the Executive Order.

Using the then recently enacted Freedom of Information Act, the plaintiffs discovered that the Interior Department had already conducted an on-site compliance review of defendant's Mishawaka plant in September, 1972, and found that Uniroyal was operating a segregated, discriminatory system of employment in violation of the Executive Order. The Interior Department had issued a deficiency letter, but Uniroyal had refused to change its practices, contending that since this Title VII suit was underway, the company was already defending itself against those same charges. The Interior Department then assured the company that it could take no further action while this litigation was still pending.

The plaintiffs then wrote the Secretaries of Labor, Defense and Interior in September of 1975 demanding that administrative action be taken against Uniroyal. The agencies responded by defending their "deferral" of any action. On October 16, 1975, the plaintiffs' attorneys filed suit in the United States District Court in Washington, D.C. for the Chrapliwy class members against the Secretaries of Labor, Defense and Interior. That complaint alleged that these officials were awarding contracts to Uniroyal in violation of their agencies' own regulations and sought enforcement of Executive Order 11246. *Chrapliwy* v. *Dunlop*. The plaintiffs sought a preliminary injunction. With court approval, the parties entered into a stipulation which provided that the officials would conduct a new compliance review of Uniroyal. The officials promised to enforce E. O. 11246 if Uniroyal was not in compliance.

Uniroyal was not a party in *Chrapliwy* v. *Dunlop* until February 27, 1976 when the plaintiffs moved to amend the complaint and join the company. This joinder was short-lived inasmuch as the district court granted the company's motion to dismiss, relying on decisions holding that the Executive Order does not create a private right of action against the employer.

Based upon the results of the compliance inspection that had been agreed upon in *Chrapliwy* v. *Dunlop*, the Department of Interior concluded that Uniroyal was still in violation of Executive Order 11246 and issued a show cause order requesting reasons why administrative action should not be commenced for cancellation of Uniroyal's federal contracts. Uniroyal sought a hearing and an order by the Director of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) that "substantial issues of law and fact" existed and had to be resolved be-

fore administrative action could be taken. The Chrapliwy plaintiffs opposed the motion, relying upon Judge Beamer's July 5, 1973 summary judgment order. On May 4, 1976, the Director of the OFCCP issued an order which determined that "substantial issues of law and fact" did in fact exist and suggested that the case be referred to the Department of Justice.

The plaintiffs opposed both OFCCP actions. The OFCCP Director reversed his decision to refer the case to the Department of Justice and thereupon issued a notice of intent to debar Uniroyal from government contracting, and commenced an administrative action against the company, *Department of Labor, OFCCP* v. *Uniroyal*, No. OFCCP-1977-1.

The Labor Department had no trial staff to conduct these proceedings, nor had they ever attempted to bar a major industrial corporation. In response to the needs of this case, the Solicitor of Labor hired a lawyer to assemble a trial staff to prosecute this case against Uniroyal.

Based upon these government actions, District Judge Pratt dismissed *Chrapliwy* v. *Dunlop* in September, 1974, and indicated that plaintiffs should exhaust their newly created remedies in the Labor Department's administrative proceedings. The *Chrapliwy* plaintiffs then intervened in the pending *OFCCP* v. *Uniroyal* case, along with defendant Rubber Workers Local Union 65.

In February, 1976, Uniroyal moved to dismiss this Title VII suit because of the pending OFCCP proceedings, which motion was denied. Uniroyal finally filed its response to plaintiffs' 1974 motion for summary judgment, along with a cross-motion for summary judgment. Reply briefs from both sides further delayed court decision in this matter.

*1977—1978*

At this point in the proceedings, Uniroyal asserted that the pretrial discovery procedures of the Labor Department were void and unconstitutional. One week prior to the Labor Department hearings on these matters, the Company's attorneys returned to this District Court seeking a declaratory judgment that the Labor Department rules for sanction hearings were void. After initially granting Uniroyal's motion for a temporary restraining order, this District Court dismissed the complaint on August 15, 1977, ruling that Uniroyal had not exhausted its administrative remedies. *Uniroyal, Inc.* v. *Marshall*, 20 FEP Cases 477 (N.D. Ind. 1977). (Marshall I). The Company appealed the denial of an injunction, but the judgment was upheld by the Court of Appeals. *Uniroyal, Inc.* v. *Marshall*, 579 F.2d 1060 (7th Cir. 1978).

Due to the proceedings here in *Uniroyal* v. *Marshall (I)*, the start of *Department of Labor, OFCCP* v. *Uniroyal* was delayed from June to November of 1977. Uniroyal still had not answered the government's request for admissions and, consequently, the Administrative Law Judge ordered that these requests be deemed admitted. Plaintiffs filed motions in the OFCCP suit contending that Uniroyal's defense in that action should be stricken, based on the summary judgment proceedings in this case. The plaintiffs' attorneys attended the administrative hearings conducted by the ALJ in South Bend during the month of November. That case was taken under advisement, and on April 11, 1978, the ALJ issued his decision in *Department of Labor, OFCCP* v. *Uniroyal*, which recommended that the Secretary of Labor cancel, terminate, or suspend Uniroyal's existing government contracts and debar Uniroyal from future government contracts "until such time that it can satisfy the

Director of Federal Contract Compliance (OFCCP) that it is in compliance with Executive Order 11246, and the Secretary of Labor's regulations issued pursuant thereto." The ALJ additionally recommended that further sanctions be imposed for Uniroyal's refusal to comply with the discovery regulations. All the parties filed exceptions to the recommended decision. The case was again taken under advisement, this time until June, 1979.

On May 31, 1977, this Court again considered summary judgment motions regarding Uniroyal's business necessity defense, and the company's cut-off of supplementary unemployment benefits to the plaintiffs. These issues were resolved in favor of the plaintiffs, *Chrapliwy* v. *Uniroyal, Inc.*, 458 F.Supp. 252 (N.D. Ind. 1977), and defendant's motion for reconsideration of these issues was denied.

*1979—1980*

In Washington, Uniroyal had begun negotiations in an attempt to settle the OFCCP debarment action, retaining former New York City Mayor Robert F. Wagner to represent the Company. On June 25, 1979, however, the Chrapliwy plaintiffs filed a new action against the Secretary of Labor, complaining therein of the Secretary's failure to issue a final judgment confirming the ALJ's recommendations of the previous year. The plaintiffs also contended that the Secretary's inaction violated his predecessor's December, 1975 agreement in the *Chrapliwy* v. *Dunlop* case. The plaintiffs requested a district court order that the Secretary issue a decision in the OFCCP case. *Chrapliwy, et al.* v. *Marshall,* Civil No. 79-1647.

On the following day, all the interested parties met in a negotiating session. This group included plaintiffs' attorneys, the OFCCP staff, Uniroyal's lawyers, and the Solici-

tor of Labor. The Solicitor indicated that she would act as the Labor Department prosecutor in the OFCCP action, while other Department attorneys would advise the Secretary when he reviewed the ALJ's recommendations. The end result of this meeting was that the plaintiffs and Solicitor entered joint settlement negotiations with Uniroyal. Two days later, June 28, 1979, Secretary Marshall issued an extensive Decision and Administrative Order, canceling, terminating and suspending Uniroyal's present government contracts and declaring the Company ineligible for any new contracts. *Department of Labor OFCCP* v. *Uniroyal,* 20 FEP Cases 419 (1979). All of the Company's exceptions to the ALJ's decision were overruled in this decision. In response, on July 2, 1979, the Company filed a petition for review of the Secretary's decision with the district court, challenging the validity of the OFCCP pretrial discovery rules, and contending in the alternative that even if these rules were valid, debarment was too extreme a penalty for noncompliance. *Uniroyal* v. *Marshall,* Civil No. 79-1702 (D.D.C. 1979). These plaintiffs were allowed to intervene as defendants, while the Union intervened as a plaintiff. The defendants, in turn, filed for summary judgment and against the granting of a preliminary injunction sought by the Company and Union. These motions were denied, and the defendant's motion for summary judgment granted, in effect reiterating the Secretary's debarment order. The pretrial discovery procedures utilized by the OFCCP were declared to be valid, and the decision to debar Uniroyal for failure to comply with the discovery procedures upheld. *Uniroyal* v. *Marshall,* 482 F. Supp. 364 (D.D.C. 1979). Uniroyal appealed this decision.

There was some disagreement whether Uniroyal was debarred on the merits of the substantive OFCCP charges that the Company had violated the Executive Order, or was

caused by Uniroyal's refusal to obey the prehearing discovery procedures. District Judge Green's order interpreted the Secretary's decision to be based only on Uniroyal's failure on the procedural and discovery issues, and not on the merits of the sex discrimination issues.

Uniroyal, acting upon Judge Green's interpretation, entered negotiations with the Labor Department, seeking a consent decree that would reinstate Uniroyal if it complied with the discovery procedures. The plaintiffs' attorneys were not included in these discussions, despite the *Chrapliwy* plaintiffs' status as intervenors in *Labor Dept., OFCCP* v. *Uniroyal, Inc.* When they learned of these negotiations, they protested against such an agreement, seeking always to defend the plaintiffs' interests before the government officials. On September 7, 1979, these plaintiffs filed a cross-appeal in the U. S. Court of Appeals for the District of Columbia, challenging Judge Green's interpretation of the Secretary's order, and contending that the Secretary's order had included a finding on the substantive violation of the Executive Order. The consolidated appeals of the plaintiffs and Uniroyal were argued, and the case taken under advisement.

In the interim, Uniroyal offered the Labor Department documents, interrogatory answers and officials to depose. Uniroyal then requested that Judge Green compel the Labor Department to reinstate the Company based upon this compliance with the discovery procedures. Judge Green asked the Secretary to reply in writing regarding his position with respect to Uniroyal's attempt to comply.

Despite these actions, time was running out for Uniroyal. By Thursday, October 18, 1979, Uniroyal was less than one week away from losing one of their largest federal contracts, leading the Company to begin serious settlement negotiations with the plaintiffs' and Labor Department's

attorneys. After an intensive weekend of drafting and discussion, an Agreement of Settlement of this class action suit and a Memorandum of Understanding between the plaintiffs and the Department of Labor regarding a plan for distribution of the cash settlement were agreed upon by the parties. As previously stated, Uniroyal agreed to pay $4,758,000 in cash, provide pension benefits with a cash value of approximately $4,560,000 and reinstate 296 of the class members to the recall list with full seniority.

This Court gave its approval, and the settlement monies were distributed. Attorneys' fees were not agreed upon at the time of settlement, reflecting the professional responsibility concerns of conducting these discussions at the same time the client's recovery is being determined. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977).

Since the final approval of the Agreement of Settlement, the *Chrapliwy* plaintiffs' attorneys have administered the cash settlement, pensions and reinstatement provisions. Questions regarding taxation obligations under the settlement have been resolved by the Court, while other issues have been resolved by the parties.

## II. *Method of Calculation*

Petitioners put forward two alternative theories of fee calculation, either one of which would result in an extremely large fee award. The first theory is that the attorneys should be awarded a contingent fee equal to one-third of the entire financial recovery, including attorneys' fees, and they compute the fees on the contingency basis to be $4,658,510.[1]

[1] The named plaintiffs signed a written contingency fee agreement with the plaintiffs' attorneys early in this case. This agreement does not in any way influence this Court's decision as to what fee should be awarded. *Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

In the alternative, petitioners contend that they have completed more than 11,000 hours of time that is properly billed to this case, and to the respondent Uniroyal, and that, at their normal hourly rate, the total bill for their services would amount to $1,510,768. They further contend that this amount should then be adjusted upward, to reflect the subjective criteria and factors authorized by *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974). Petitioners suggest that various multipliers be applied to the above figure to satisfy these factors. Specifically, they request a multiplier of 3.5 for the lead counsel, 2.625 for another attorney, and 1.75 for several others. Petitioners then compute that this alternative would entitle them to an award of $5,116,174, and for this reason they suggest that the lower contingent fee basis should be adopted.

The respondent replies that a contingency fee theory is totally inapplicable under Title VII, and, in any case, that the petitioners' proposed method of calculation is wholly incorrect. Instead, Uniroyal contends that the compensable hours of the plaintiffs' attorneys amount to only 6,408.5, and should be compensated at the South Bend hourly average rate for attorneys of equal experience. On this basis, they assert that the proper fee to be paid is $291,718, and that no upward adjustment should be made in this case.

The threshold question we encounter is: what is the proper method of computing this "reasonable fee"—by a contingency fee, an hourly rate, or an adjusted hourly rate?

The historical equitable powers of the federal bench to devise adequate remedies in the attorney's fee area has been sharply limited by the Supreme Court, which has held that fee authorizations should come from Congress, and not the judiciary. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). That authorization does exist in

this case, along with the Court's admonition that the district judge should exercise sound discretion in setting an award that will effectuate the purposes underlying Title VII. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). These purposes include, of course, encouraging workers to litigate bona fide cases of employment discrimination while represented by competent attorneys, all in an endeavor to spur the final dismantling of discriminatory practices in the workplace. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The Seventh Circuit has not adopted any single approach to Title VII fee awards. All of the Circuit Courts of Appeals which have recently considered these issues have ruled that the most appropriate method of measuring attorney's fees is to calculate the allowable hours worked, and multiply this by a typical hourly billing rate to determine the "lodestar" figure. This lodestar is then subject to upward, or theoretically downward, adjustment based on a number of factors which include but are not limited to the difficulty of the legal issues, the skill of the petitioning attorneys, the quality of their work product, and the time limitations the representation imposed. *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 168-69 (3d Cir. 1973) (Lindy I); *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976) (Lindy II) (en banc); *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974); *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977); *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). The Fifth Circuit adopted a slightly different approach, listing twelve factors they considered important for the trial court to consider. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The rulings in these circuits have most recently been adopted in *Copeland* v. *Marshall*, ___ F.2d ___ (D.C. Cir. 1980), a Title VII case. This decision has made it clear that the lodestar method is the preferred method of determining a reasonable attorney's fee. Although the Seventh Circuit has not as yet adopted this approach, nothing in its past decisions would be at odds with this method of calculation. *See Waters* v. *Wisconsin Steel Works of International Harvester Co., supra; Kamberos* v. *GTE Automatic Electric, Inc.*, 603 F.2d 598, 603-04 (7th Cir. 1979). The *Copeland-Lindy* approach has been used by other district courts, including some in this Circuit. *See Jorstad* v. *IDS Realty Trust*, ___ F. Supp. ___ (D. Minn. 1980); *Liebman* v. *J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974); *Boggess* v. *Hogan*, 410 F. Supp. 443 (N.D. Ill. 1976).

The contingent fee theory has little to favor it in light of the congressional policies involved. One of these considerations is preventing against recoveries by a private attorney general, e.g. the petitioners, that is "so lucrative as to ridicule the public attorney general." *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d at 719. In this case, a contingent fee recovery has the propensity to create a windfall for the prevailing attorneys when a successful settlement or judgment is reached. While this may be an accepted part of our legal system in some respects, it has no place in statutorily authorized "reasonable fee" cases. This can easily be demonstrated by reference to those situations where the monetary relief is small, but Title VII plaintiffs are reinstated or given other equitable relief. Thus, in *Causey* v. *Ford Motor Co.*, ___ F. Supp. ___ (M.D. Fla. 1976), cited by petitioners, the plaintiffs' back pay award was approximately $2,500 while the attorneys' fees approved were $20,000. In *Copeland, supra*, the plaintiffs received $33,000 in back pay, while the attorneys received $160,000 in fees. Cases where a district court has awarded

a fee by simply taking a percentage of the recovery have become rare, and no examples of such a measurement in a Title VII case has been cited. In light of the judicial attention given attorneys' fees determinations in this decade, particularly the decisions culminating in *Copeland*, such a method cannot be utilized, however appealing its simplicity and ease of calculation. *Technology Fund, Inc.* v. *Kansas City Southern Industries, Inc.*, 72 F.R.D. 433 (N.D. Ill. 1976).

In a normal contingent fee case, payment is taken from the plaintiffs' actual recovery, rather than stacking another cost atop the payments already made by the defendants. The difference in source is only exacerbated when one considers that the plaintiffs here are seeking one-third of the *total recovery, including attorneys' fees.* This method does not result in a reasonable fee, and will not be considered here.

For these reasons, the fee in this case will be calculated by the method utilized in *Copeland* v. *Marshall, supra,* and the other cases previously cited. We believe that this method will effectuate the congressional policies underlying Title VII.

III. *Determining the Chrapliwy Lodestar Amount*

By accepting that the petitioners' attorneys' fees must be calculated by the lodestar method, this Court has created a plethora of issues which must be addressed. We must first determine which of the hours can reasonably be charged to this proceeding and what hourly fees are appropriate. The cases hold that the court is itself an expert on the question of reasonable attorney's fees, and may consider its own knowledge and expertise to form an independent judgment as to the value of time spent on the litigation. *Payne* v. *Travenol Laboratories, Inc.*, 74 F.R.D. 19, 21 (N.D. Miss. 1976).

### III A. *Compensable Hours*

Petitioners have submitted time records and requested payment for more than 11,000 hours. In its response, Uniroyal contends that this number of hours should be drastically reduced and cites six different reasons: *First*, and most significant, in terms of the number of hours involved, Uniroyal contends that the petitioners' actions in seeking to have Uniroyal debarred from federal contracts for discriminatory practices are not compensable under the Title VII fee provision. Uniroyal has segregated 2,348.3 hours spent on these proceedings;[2] *Second*, Uniroyal contends that some of the hours petitioners are billing are attributable to its co-defendant, Local Union 65 of the United Rubber Workers, and should not be paid by Uniroyal; *Third*, Uniroyal requests that one-half of the time spent negotiating the final settlement, and its implementation, should not be compensated; *Fourth*, Uniroyal terms as "outrageous" the requested fee for time petitioners have spent as escrow agents for the settlement fund; *Fifth*, Uniroyal contends no payment should be made for time spent preparing the attorneys' fees petition; and *Sixth*, Uniroyal questions the payment of any portion of a fee for petitioners' travel time during the suit. Each of these issues will be discussed in turn.

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[2] Uniroyal's segregation of the hours applicable to each particular topic has been utilized. Unfortunately, such an analysis suffers from a major deficiency. Where the plaintiffs' attorneys' time entry referenced more than one matter, the time involved was divided equally, albeit arbitrarily, between the topics. Despite this, there does not appear to be any satisfactory solution to this problem, other than requiring an expensive and burdensome breakdown of specific time entries. For this reason the Court will use the averaging approach stated above.

1. *Debarment Procedures*

Uniroyal contends that the petitioners should not be reimbursed for the hours spent pursuing the debarment of Uniroyal from federal contracts. Uniroyal has admitted that had the government not barred Uniroyal from government contracts, they would not have settled this suit. Attorney Kalish, Uniroyal's chief negotiator, stated, in an affidavit attached to Uniroyal's brief: "It was definitely the loss of government contracts which forced Uniroyal to settle." Therefore, Uniroyal is in the somewhat incongruous position of contending that the hours petitioners spent prodding and harassing the federal bureaucracy into action, which actually led to the settlement, should not be compensated. However, as a matter of law, the plaintiffs' attorneys cannot be reimbursed for these hours.

Several reasons dictate this decision, but, most importantly, the remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment. In this case, the collateral proceedings may have been the proximate cause of the success achieved by the plaintiffs. Success alone, however, does not legitimize a request for fees regarding procedures that were not contemplated under Title VII's attorney's fee provisions. This is made amply clear by the wording of the attorney's fee statute and the cases which have interpreted it. Section 706(k) (42 U.S.C. § 2000(e)—5(k)) provides:

> In any action or proceedings *under this subchapter*, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." (emphasis added).

This section requires that the attorney's times and efforts be mandated by the Title VII statute, or by related

and required procedures. The emphasized language makes it clear that the attorney's time must be within the Title VII procedure. The Executive Order utilized here cannot be transformed by legal alchemistry into such a proceeding.

The reach of the Title VII attorney fee provision was recently examined by the Supreme Court in *New York Gaslight Club, Inc.* v. *Carey*, ____ U.S. ____, 100 S.Ct. 2024 (1980). *Carey* did not reach the issue in this case, i.e., whether collateral proceedings with the same goal orientation, but not provided for under Title VII, can be compensated. *Carey* does, however, give a clear indication of just how far the Title VII attorney's fee provision can be stretched. In *Carey*, the Court sanctioned plaintiffs' attorneys' fees for all related state or other administrative proceedings, including any hearing before the Equal Employment Opportunity Commission (EEOC), or state and local agencies. In that case, the initial charge of discrimination was made to the EEOC, which then deferred action, referring the matter to the proper state administrative agency, a deferral required by Section 706(c). The EEOC eventually issued a right to sue letter, and a suit was filed in federal court, but it was voluntarily dismissed except for the attorney fee petition when a satisfactory settlement was achieved in the required state proceedings. The Court approved the payment of fees for those proceedings, noting:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 48-50, 94 S.Ct., at 1019-21.

100 S.Ct. at 2031.

The various lawsuits filed in addition to the parent *Chrapliwy* v. *Uniroyal* claim are simply *not mandatory procedures.* Although the EEOC and Title VII do reflect the same goal orientation as the OFCCP and Executive Order No. 11246, i.e., ending discrimination in the work place, the two cannot be fused into one overarching mechanism. The OFCCP is charged with administering the contract compliance program, while the EEOC enforces Title VII. *Emerson Electric Co.* v. *Schlesinger,* 609 F.2d 898 (8th Cir. 1979). Although these agencies are allowed to cooperate and exchange information, their duties are distinct.

Furthermore, those cases which have addressed the issue have not found a private right of action implied by the Executive Orders pertaining to the discrimination area. *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3, 8-9 (3d Cir. 1964); *Farkas* v. *Texas Instrument, Inc.,* 375 F.2d 629, 633 (5th Cir. 1967). Although those cases did not discuss Executive Order 11246, the predecessor of this Order was considered. The gist of those holdings is that the Executive Orders are to be enforced by government administration, not private civil actions.

The court is aware that in this case the government agencies responsible for enforcing the Executive Order were slow in performing their statutory function. While they may perform more satisfactorily in the future, that is arguably a result of this litigation. As a product of the plaintiffs' determined prodding, a new OFCCP staff has been established to enforce Executive Order 11246 and this will be taken into account when the subjective quality adjustment is being considered.

Aside from the nature of the Executive Order, it would be inappropriate to charge Uniroyal attorney fees for cases to which they were not a party, or cases wherein the plain-

tiffs did not formally intervene. Uniroyal was not a party to *Chrapliwy* v. *Dunlop*, except for a very limited amount of time, nor in *Chrapliwy* v. *Marshall*. Likewise the plaintiffs were not a party to *Uniroyal* v. *Marshall*.

The steps plaintiffs took to seek Uniroyal's debarment were not unreasonable nor undesirable. This court scrupulously upheld the plaintiffs' right to make such an effort, characterizing it as follows:

> /B/y writing to the Federal agencies to inform them of alleged discriminatory practices in violation of Executive Order No. 11246, and by seeking an order to compel the appropriate agencies to bring Uniroyal's alleged discriminatory employment practices into compliance with Executive Order 11246, the plaintiffs' attorneys have attempted to diligently pursue a second available means of redress for their clients. Since Uniroyal engages in interstate commerce and receives Federal Government contracts, plaintiffs' attorneys have the statutory right to simultaneously pursue remedies under 42 U.S.C. 2000e et al., and Executive Order 11246. *Contractor's Assn.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).
>
> Moreover, the attempts of the plaintiffs' attorneys to secure relief for an alleged violation of Executive Order No. 11246 are protected by the First Amendment right to "petition the Government for a redress of grievances".

This does not, however, give this Court the equitable power to require the payment of attorneys' fees for these efforts. The *Carey* holding and language of Section 706(k) circumscribe the district court's ability to award payment for these hours. The Executive Order itself does not contain a private right of action nor, of course, any attorney's fee provision. Therefore plaintiffs' attorneys will not be compensated for these hours which were attributed to the debarment proceedings.

2. *Time Attributed to Union Liability*

Uniroyal contends that 265 hours of the time for which petitioners seek compensation should be charged to the defendant unions involved, Local Union No. 65 of the Rubber Workers and the parent International organization. The status of these defendants has not as yet been settled, and they did not contribute anything to the settlement fund which the plaintiff class received. The petitioners contend that they have removed all time entries that specifically relate to the Union's liability, and have billed only those hours which contributed to the case against Uniroyal. The record is clear that petitioners' discovery of materials controlled by the Union did have direct impact on this case, and contributed in establishing Uniroyal's liability. *Chrapliwy* v. *Uniroyal, supra,* 6 FEP Cases at 100. After reviewing these time entries, however, the Court finds that the majority do not pertain to Uniroyal's liability, but, rather, refer to Union defenses and Union liability. The Union must bear its share of the costs involved in this lawsuit, and inasmuch as the Union's liability and status have not as yet been determined, these costs cannot now be shifted to Uniroyal. Where a collective bargaining agreement violates Title VII, the costs of rectifying the discrimination should be shared by the employer and union. *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1381-82 (5th Cir. 1974). Similarly, it is even clearer that the costs of litigation should be apportioned to the parties in a case which establishes a Title VII violation.

3. *Time Attributable to Settlement Negotiations and Approval and Implementation of Settlement*

Petitioners seek compensation for 1,138 hours relating to the settlement negotiations, and 856.5 hours for the approval and implementation of the settlement with Uniroyal,

with the representative plaintiffs, and with the Department of Labor. Uniroyal's sole contention is that the Government's claims were so inextricably linked to the plaintiffs' case that 50% of the negotiations were devoted to each set of claims, and, therefore, one-half of the time the petitioning attorneys spent should be excluded from compensation.

Uniroyal's position in this matter is without merit. It was Uniroyal's litigation strategy which placed the defendant in the unenviable position of having to settle in the eleventh hour contract debarment proceedings. Uniroyal cannot allocate petitioners' hours to the Department of Labor's monitoring and approval power. Uniroyal placed itself in a position where the settlement not only had to be satisfactory to the plaintiffs but to the Government as well. If attorney fees were incurred because of this linkage, the burden cannot be shifted to the petitioners.

The settlement negotiations are of a different nature than the hours spent on the debarment proceedings. These hours were expended in a direct attempt to resolve the Title VII lawsuit, and, for this reason they will be fully compensated.

4. *Payment for Time Spent as Escrow Agent*

The plaintiffs' lead attorney was appointed as escrow agent for the cash settlement fund which was paid directly to each plaintiff. Plaintiffs' attorneys carried out this task, distributing almost the entire $5,000,000 cash fund within six weeks of Uniroyal's final settlement payment. As part of the payout, petitioners were required to negotiate with the various taxing authorities in order to withhold the proper amount of taxes from the payments to the class members. The plaintiffs' attorneys request payment for 129.9 hours for these services. Defendant points out that the agreement of settlement provides that the escrow agent "shall serve without compensation," and claims the petitioners' request for fees is in direct contradiction with the agreement of the

parties. Defendant's position is that petitioners merely volunteered their time and should not be compensated for these hours.

The services of the petitioners, in administering and distributing the settlement fund, mixed their duties as attorneys and as escrow agent. The time spent necessarily benefited the plaintiff class in duties that had to be performed. While the escrow agent was not to be paid, the agreement cannot be taken out of context as the defendant urges to deny compensation to the petitioners. While they were not paid as escrow agents, the substance of this agreement does not preclude the petitioners being paid as attorneys for the necessary services rendered. They should be compensated for time spent upon these duties.

5. *Preparation of the Attorney's Fee Petition*

Petitioners request compensation for 581 hours devoted to preparing this fee application and supporting documentation. Defendant contends that no fee, or a reduced fee, should be paid. Payment for time spent preparing an attorney's fee application was recently approved by the Seventh Circuit in *Bond* v. *Stanton*, ___ F.2d ___ (7th Cir. 1980). Although that decision was based upon the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, its reasoning is dispositive of the issue here.

Other Circuit Courts of Appeals which have considered this issue have reached similar results with respect to both Title VII and other Civil Rights Act Attorney's fee statutes.[3] It reflects the congressional intent that plaintiffs

[3] *Johnson* v. *State of Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979); *Gagne* v. *Maher*, 594 F.2d 336, 343-44 (2d Cir. 1979), *aff'd*, ___ U.S. ___, 100 S.Ct. 2570 (1980); *Weisenberger* v. *Huecker*, 593 F.2d 49, 53-54 (6th Cir.), *cert denied*, ___ U.S. ___, 100 S.Ct. 170 (1979); *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978); *Prandini* v. *National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978).

have the counsel of attorneys to vindicate their rights, and to encourage attorneys to accept these cases. The work product of these hours is very helpful in assisting district courts to an informed determination of what are "reasonable fees." The petitioners' extensive briefs and appendices, as well as the defendant's response, have been very helpful in clarifying the numerous legal issues here involved. In light of *Bond* v. *Stanton*, there is no doubt these hours were reasonably spent and should be fully compensated.

6. *Travel Time*

Petitioners have requested payment for 558.70 hours travel time, of which 316.45 pertain directly to the *Chrapliwy* case. Defendant contends that no payment for these hours of travel should be made, relying upon *N.A.A.C.P.* v. *Bell*, 448 F. Supp. 1164, 1168 (D.D.C. 1978), *rev'd on other grounds*, 609 F.2d 514 (1979). That case does not put forward any reason or authority to deny hourly compensation for time spent traveling.[4] The defendant also advances an alternative line of argument, contending that travel fees, if awarded, should be substantially reduced. In *Keyes* v. *School District No. 1, Denver, Colo.*, 439 F. Supp. 393, 409 (D. Colo. 1977), a school desegregation case, the court awarded travel time of only one-half the approved hourly rate, while in *McPherson* v. *School District No. 186*, 463 F. Supp. 749 (S.D. Ill. 1978), the award was two-thirds of the approved hourly rate. In view of the clearly articulated congressional policy of enabling plaintiffs to obtain capable legal counsel, it is appropriate to compensate petitioners at their usual hourly rates for travel time. This recognizes the reality that this time is valuable, even if an attorney cannot be totally productive while traveling. It will allow attorneys of special skill in

[4] It does provide authority for a substantial hourly rate of $100.00 per hour for nontravel hours.

managing Title VII litigation to provide their skills in areas not within their immediate geographical reach.

7. *Additional Hours*

The petitioners request payment for 565 additional hours allegedly devoted to the case since April 30, 1980, when the original time records were submitted to this Court. This time is related to the following issues:

(1) a reply brief on the attorney's fee issue as well as final preparation of the fee application.

(2) a dispute regarding pension benefits ultimately settled by agreement of the parties.

(3) a dispute as to the proper incidence of taxation relating to settlement monies which was decided by the Court.

(4) routine administration of the settlement.

While these hours are reasonably related to the case, compensation for these additional hours will be computed at the lower rate of $60.00 per hour.

III B. *Reasonable Hourly Rate*

To determine attorneys' fees under the *Copeland* formula, the Court must determine the reasonable hourly fee to be charged for each of the plaintiffs' attorneys. Plaintiffs contend that their New York counsel has an hourly billing rate of $200 per hour, their *Washington, D.C. lead counsel, $175 per hour,* while their two local counsel bill at $70 and $60 per hour, respectively. The seven other attorneys who assisted in this litigation claim hourly rates ranging from $50 to $175 per hour. Petitioners seek to have the lodestar figure computed by multiplying these hourly rates against the number of compensable hours. They contend that 1980 billing rates should be used since that will protect their

income from the inflation which has occurred since 1973. Uniroyal, however, contends that these rates should reflect the fees charged at the time that the hours were worked.

1. *Locality billing rate or rate charged by the attorney*

Defendant contends that the hourly payment to petitioners must conform to the customary rate in the South Bend area, not the fees charged in Washington or New York. Uniroyal's affidavits with regard to South Bend rates indicate that attorneys' fees ranged from a low of $35 per hour in 1973 to $85 per hour in 1980, depending, of course, upon the skill of the attorney involved.

Before considering the case law in this area, it should be noted that defendant has engaged similarly skilled and expensive counsel to represent its interests in this suit. Defendant has employed four major, nationally recognized, law firms, and forty-five attorneys in its spirited defense, for a total of 10,963 hours billed through July 22, 1980.[5] Uniroyal had its own $175 and $200 per hour attorneys, as well as $75 and $100 per hour attorneys, according to the 1980 billing rates. Presumably, these fees were received on a regular basis, without risk of nonpayment. On the other hand petitioners were not paid anything until this litigation was settled, and they might conceivably have come away with empty hands. Because of the overwhelming evidence of sex discrimination as practiced by Uniroyal, we do not consider plaintiffs' risk of failure, and the consequent loss of fees to petitioners, to have been very great. This will be more fully taken into account when the Court considers the subjective aspects of the *Copeland* and *Waters* formulas, and deals with the contingency risk issue. More significantly at this juncture, the factual data indicates that

[5] Ascertained by answers to interrogatories propounded by plaintiffs' counsel.

the defendant's attorneys billed Uniroyal at hourly rates roughly comparable to the hourly wage sought here by these petitioners.

The congressional intent in allowing attorney's fees was, in part, to encourage individuals injured by discrimination to seek judicial review and to deter discrimination. Congress recognized, however, that this system would work only if the fee provided an incentive for competent lawyers to undertake such employment and to receive adequate compensation for the time they expend. *Piggie Park, supra,* 390 U.S. at 402.[6]

This policy was also discussed in *Johnson* v. *Georgia Highway Express, Inc., supra,* 488 F.2d at 719-20, which stated:

> The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession.

The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exhorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. It would not advance the congressional policies as interpreted

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[6] *See also Copeland,* ___ F.2d ___, slip op. at 19. The Civil Rights Attorney's Fee Award Bill of 1976, which is similar in language and principle to the attorney's fee provisions of Title VII also have recognized this. See *Copeland, supra,* at 33 and the dissent, footnotes 20-22 with citation to the House of Representatives and Senate Reports on the multiple purposes of the attorney's fees provisions.

by *Piggie Park, supra,* or *Johnson* v. *Georgia Highway Express, supra,* to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys. If Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting petitioners to the local billing rate. The plaintiffs' attorneys' billing rate must, of course, be balanced against the local billing rate to achieve the reasonable rate required by the statute. The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale.

The case law reflects the split between the two methods of calculating the hourly rate: local billing rates versus the attorney's usual billing rate. In *City of Detroit* v. *Grinnell Corp., supra,* 560 F.2d at 1102, the court allowed attorney fees of $125 and $100 per hour, stating:

> An award in such amount is not to be bestowed upon a lawyer representing a class simply on the basis of his having earned entrance into the legal profession. This should especially be avoided when such an amount becomes the foundation for superimposing fees of double and treble the "reasonable" amount, with the result becoming quite unreasonable.

In *Arenson* v. *Board of Trade of City of Chicago,* 372 F. Supp. 1349 (N.D. Ill. 1974), the court allowed hourly fees ranging from $65 to $125 per hour, although the multiplier that was used raised these rates to $240 and $358 per hour.

In *Technology Fund, Inc.* v. *Kansas City Southern Industries, Inc., supra,* Judge Will allowed an hourly rate of $150 for the most senior partner appearing on behalf of the plaintiffs. This rate was justified due to the prominence and skill of the attorney involved. Judge Will also based his

decision on the rates that lawyers routinely billed their clients.

Defendant cites several cases to support the position that hourly rates must be determined in accordance with the hourly rate charged for similar services in the locality where the cause is heard. This is one of the factors set out by the Seventh Circuit in *Waters* v. *Wisconsin Steel, supra,* as well as *Johnson* v. *Georgia Highway Express, Inc., supra.* Neither case does more than mention this as one of the dozen factors to be considered, and neither instructs as to what should be done when a "specialist" from Washington or New York, with much higher fixed cost than local counsel, enters the case.

Defendant's position receives some support from the decision in *McPherson* v. *School District #186, supra,* a case falling within the ambit of the Civil Rights Attorney's Fee Award Act. The Court began its analysis by acknowledging that there was no guidance from other decisions as to whether a national or local average should be used. The case was tried in Springfield, Illinois, while the successful plaintiff's counsel from Milwaukee and a consulting attorney from New York sought $100 per hour fees. Judge Ackerman rejected the New York rates in part, using Springfield's average as a base fee, and adjusting the rate upward depending on the skill and standing of the attorney involved. While $50 an hour was the rate for skilled attorneys in Springfield, fees of $60 per hour were granted for the New York attorneys.

In *Keyes* v. *School Dist. No. 1, supra,* the district court reduced the hourly rate claimed by a prominent Denver firm that enjoyed substantially higher billing rates than the area average. In *Payne* v. *Travenol Laboratories, Inc., supra,* the local billing rate was $35 per hour, and this figure was paid despite the $100 per hour billing rate of

the plaintiff's lead counsel. These cases indicate that some balancing is required between the rate requested by the plaintiff's and the defendant's position.

### 2. *Present or Historical Billing Rates*

One additional problem has already been raised—i.e., should the hourly wages be paid at the billing rates that prevailed in 1972 or 1973 as defendant contends, or should the petitioners be paid at their 1980 billing rates to offset the inflation which has increased the price levels in effect six and seven years ago.

Petitioners point out that the Consumer Price Index for October, 1972, when this litigation began, was 126.6. In July, 1980, it was 248, indicating a consumer price increase of 95% in the last eight years, a fact of life of which everyone is painfully aware. Several large class action cases support petitioners' contention that current billing rates should be utilized to provide an equitable result.

In *Copeland, supra,* the Court stated:

> Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage and adjustment to reflect the delay in receipt of payment therefore may be appropriate. Lindy II, 540 F.2d at 117.[23]

___ F.2d at ___.

[23] On the other hand, if the "lodestar" itself is based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the harm resulting from delay in payment may be largely reduced or eliminated.

Other cases support the proposition that present billing rates should be used. In *In Re Ampicillin Antritrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978), the Court stated:

> The rates used are based upon current normal rates, despite the fact that the services were provided over an eight-year period. This use of current rates simplifies the Court's task and roughly counter-balances the inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees.

In another protracted lawsuit, which took seven years to complete, current billing rates were used. *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132, 1134 (S.D. N.Y. 1977). The court stated: "Where the attorneys have waited so long for any compensation, it seems that a calculation at present rates is appropriate to compensate for loss of interest or inflation."

On the other hand, some district courts have used the historical rates at which attorneys had billed in the past, rather than present billing rates. *Imprisoned Citizens Union* v. *Shapp*, 473 F. Supp. 1017 (E.D. Pa. 1979). While others have used the historical rates, they have then increased the contingency multiplier to reflect the lower value resulting from the historic rates. *In Re Equity Funding Corp. of America Securities*, 438 F. Supp. 1303, 1331 (D.C. Cal. 1977) (case lasted four years); following *Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976); *Weiss* v. *Drew National Corp.*, 465 F. Supp. 548, 552 (S.D. N.Y. 1979). In *Aamco Automatic Transmissions* v. *Tayloe*, 82 F.R.D. 405 (E.D. Pa. 1979), historic billing rates were used, but the court awarded a modest "bonus" to compensate for the long delay in obtaining payment. Policy considerations indicate that to the extent historical rates were based on costs of overhead and services paid for at the time, ad-

justment by using current billing rates could result in a windfall for plaintiff's attorneys. A. Miller, Attorney's Fees in Class Actions (Federal Judicial Center 1980).

All of the varied policy concerns discussed must be taken into account during a period of escalating inflationary pressures. It should be recognized that the higher current rates reflect the considerable increase that inflation has wrought over the eight-year period involved in this long case, an increase that has accelerated during the final months since the debarment proceeding prodded Uniroyal to accept a final settlement in this case.

As stated above, the district court in *In Re Ampicillin Anti-Trust Litigation, supra,* indicated three years ago that the use of what were then current normal rates "roughly counterbalances the inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees." 81 F.R.D. at 402. The *Copeland* court also recognized that fact. This is very heavily impressed upon the Court as we weigh the several factors discussed above.

Administratively, the Court would be hard pressed to assess the proper hourly rate the attorneys of differing skills and experience should be paid for their work during each of the eight years this litigation continued. The various rates the Court has adopted reflect the interrelationship of the lodestar analysis. If current rates were not used, the amount awarded for the subjective risk and quality factors would have been greatly increased. For all these reasons, the use of *current billing rates will be utilized.*

| Attorney | Rate Requested | Defendants Proposed | Rate Allowed | Hours Requested | Hours to be Compensated | Lodestar Figure |
|---|---|---|---|---|---|---|
| Ewald | $175 | $60-$85 | $75 | 6,324.8 | 4,552.7 | $341,452.50 |
| Blumrosen | 200 | 60 | 75 | 427.2 | 248.1 | 18,607.50 |
| Fette | 70 | 60 | 50 | 2,844.5 | 2,562.4 | 128,120.00 |
| Mick | 60 | 60 | 50 | 1,086.3 | 1,008.8 | 50,440.00 |
| Frum | 110 | 60 | 50 | 301 | 41.4 | 2,070.00 |
| Seymour | 175 | 60 | 75 | 48.5 | 43.4 | 3,255.00 |
| Ginsburg | 125 | 60 | | 29.7 | 0 | |
| Ryan | 80 | 40 | 50 | 31.5 | 31.5 | 1,575.00 |
| Bent | 50 | 50 | 50 | 40.6 | 40.6 | 2,030.00 |
| Gautier | 50 | 50 | 50 | 25.5 | 25.5 | 1,275.00 |
| Passaro | | | 50 | 19.2 | 19.2 | 960.00 |
| Sub-Total | | | | 11,178.8 | 8,573.6 | 549,785.00 |
| Additional Hours since 5/1/80 | | | $60 | 565. | 565. | 33,894.00 |
| Total | | | | | | $583,679.00 |

### IV. *Subjective Considerations for Adjusting the Lodestar Figure*

A concomitant of rejecting the petitioners' contingent fee theory is an acceptance that the "lodestar" figure arrived at by multiplying hours times rate, may be adjusted upward or downward based on the more subjective criteria announced in *Waters, supra.* For example, in *Kamberos* v. *GTE Automatic Elec., Inc., supra,* the court approved a twenty-five per cent increase of the lodestar figure in a routine Title II action.

The court in *Jorstad* v. *IDS Realty Trust, supra,* adopted the subjective considerations expressed in *Lindy Brothers, supra,* which included two broad categories: the risk of non-recovery, and quality of the attorney's work, and awarded specific dollar amounts for each of these categories.[7] Each of these cases dealt with securities violations. The Seventh Circuit has indicated in a previous Title VII case that a decision on attorney fees should take into account all of the factors in the ABA Code of Professional Responsibility, Disciplinary Rule 2-106. *Waters* v. *Wisconsin Steel Works of Int. Harvester Co., supra,* 502 F.2d at 1322. Some of these Rule 2-106 factors overlap, and each factor can be allocated to either the risk or the quality issues. For this reason the Court will briefly state the findings of fact with respect to each of the applicable *Waters* factors, and award the appropriate adjustments to

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[7] The court awarded $800,000 for the risk factors, and $800,000 for the quality of the work performed on the merits of the case. The base fee for hours spent on the merits totaled $545,609.50. The hourly rate the attorneys were paid ranged from $125 to $60 per hour. In addition, fees of $226,558 were granted for time spent on the fee application, with a further $225,000 paid for the risk factor in the attorneys' fee application. The sum of the fee award was $2,597,167.75, with an additional $124,482.65 in expenses being paid.

the lodestar figure on the basis of the risk involved, and the quality of the representation provided by the petitioners.

In assessing the risk of non-recovery and the quality factor, the hours reasonably spent on the case after the settlement are not taken into account. Those hours were not at risk, and were fully compensated for by the payment of the regular hourly wage. For this reason the total number of hours worked under the risk of non-recovery is approximately 7,300 hours.

A. *The Risk of Non-Recovery*

The award must take into account that some of these cases are lost. As stated in *McKittrick* v. *Gardner*, 378 F.2d 873, 875 (4th Cir. 1967):

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

*See also, Dolglow* v. *Anderson*, 43 F.R.D. 472, 494 (E.D.N.Y. 1968).

Uniroyal argues that no contingency risk of non-recovery existed after the July, 1973 partial summary judgment in favor of the plaintiffs. The history of this litigation, however, indicates that this contention is without merit. Uniroyal did not surrender after the 1973 summary judgment, nor after any further order building upon that finding of liability, but, rather, continued to file motions attacking this Court's jurisdiction, asserted novel business defenses, and at one point sought sanctions against the petitioners as well as dismissal of this suit. No ground was surrendered

without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement. However, Uniroyal's violation of the sex discrimination laws might suggest that no real risk of non-recovery ever existed here.

As Judge Rubin noted in *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976): "Those who elect a militant defense in the face of a statute allowing attorney's fees if they are defeated must take into account the time and effort they exact from their opponents." It was Uniroyal's right to contest every aspect of this claim, but they cannot now disclaim the consequences of their actions.

Uniroyal relies upon several cases wherein plaintiffs' attorneys were virtually assured of being paid for their efforts in the litigation. A comparison of the facts in these cases with this litigation shows how inappropriate such an analogy would be. For example, in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 2999-3000 (1980), the decision not only noted that the legal issues were not novel, but stated: "[W]e do not believe there was a very fair chance that the plaintiffs would wholly fail to prevail." In *City of Detroit* v. *Grinnell, supra*, the plaintiffs filed suit after the government had already succeeded in proving an antitrust violation. The government's findings of fact and conclusions of law were incorporated in the class complaint. It is not surprising that these circumstances led the appellate court to reduce the threefold multiplication of the lodestar figure. In contrast, these Chrapliwy plaintiffs supplied the government with the raw materials of its case in this litigation. Unlike *Northcross* or *Grinnell* where only a portion of the time spent in the case was taken under the risk of non-recovery, Uniroyal's tenacious and skilled

defense of its position always left an element of doubt as to the conclusion of this litigation, despite the discrimination which occurred. This is supported by Uniroyal's affidavits, which indicate that this suit was settled only because of the threatened federal debarment. The entire suit was conducted with some risk of non-recovery until the settlement was reached in October, 1979.

1. *The Novelty and Difficulty of the Legal Questions Involved and the Skills Exhibited in the Resolution of these Problems*

Another portion of the overall risk of non-recovery is an assessment of the difficulty of the legal and factual issues the petitioners faced and how they were overcome. Uniroyal contested every aspect of this lawsuit, from discovery disclosures to the substantive law of fair employment practices. The company's stubborn defense forced the plaintiffs into strenuous efforts to advance their case. From the viewpoint of judicial economy, the petitioners utilized an extremely economical method of proof, relying upon well documented and carefully detailed requests for admissions and interrogatories. This avoided a burdensome trial using these materials, which would have been difficult to manage, time consuming, and due to the staggering volume of material, possibly unintelligible. This somewhat plodding but certain method of proof saw the plaintiffs prevail each time summary judgment was requested, despite Uniroyal's vigorous defense.

Managing a large class action is never an easy task, but maintenance of this class action was difficult, and required the constant attention of the petitioners. The length of time the suit was pending, combined with the continual rumors of Uniroyal's demise, led to "opt outs" by members of the plaintiffs' class. The issue of settling class membership was heavily litigated, with Uniroyal's contention that

continued opt outs be allowed finally being settled by the Court.

In February, 1976, Uniroyal sought dismissal of this case and contempt sanctions against the plaintiffs and their attorneys, claiming that these petitioners had violated this Court's order restricting communications with the plaintiff class, and, further, had violated the ABA's Code of Professional Responsibility. Both issues were resolved against Uniroyal. *Chrapliwy* v. *Uniroyal*, 71 F.R.D. 461, 12 FEP Cases 1664 (N.D. Ind. 1976).

In summary, it is clear that had the petitioners faltered in any respect with the difficult legal issues faced, they could have lost their case, or have been placed in a much weaker position for settling the claim.

2. *Time Limitations Imposed by the Litigation*

There must have been periods during the past seven years when the petitioners could have done nothing but work on *Chrapliwy* and its progeny. These periods include October and November of 1972, when the plaintiffs began preliminary investigations with the ninety day EEOC statute of limitations requiring quick action; the period proceeding the discovery deadline of June 1, 1974; the period immediately prior to the filing of each summary judgment motion; and the final months of this litigation, from June till October, 1980. These time limitations circumscribed the practice of the attorneys in this case, although this restriction is offset by the fact that the plaintiffs will now be paid for these hours.

Defendant contends that *Kamberos* v. *GTE Automatic Electric, Inc., supra*, is authority for rejecting any claim for increased compensation based on time limitations. That case is inapposite. The attorneys in that case worked 268

hours over a *six* year period, indicating that there were no "time limits" imposed on the petitioners' practice. As these findings indicate, that is not the situation faced here.

B. *Quality*

1. *The Experience, Reputation and Ability of the Lawyers Performing Services*

In deciding attorney's fee awards, other courts have considered the experience, reputation and ability of the lawyers.

*Waters* v. *Wisconsin Steel Works of International Harvester Co., supra; Johnson* v. *Georgia Highway Express, Inc., supra; Arenson* v. *Board of Trade of City of Chicago, supra; Jorstad* v. *IDS Realty Trust, supra.*

These criteria have, to some degree, been computed in the hourly rate since a skilled and experienced attorney commands a higher hourly rate than a neophyte who lacks trial experience. *Wehr* v. *Burroughs,* 22 FEP 982, 987 (E.D. Pa. 1979). With this caveat in mind, there are some comments that should be made on the quality aspect of the attorneys' involvement.

Overall, the petitioners brought to this litigation a more than adequate command of trial advocacy techniques, particularly those required to manage a large Title VII action. It is not necessary to discuss each lawyer who took part and state his past experience and the skills exhibited here. It is sufficient to state that the petitioners who were not drawn from this area had a strong background in fair employment litigation, particularly in Title VII cases. The local counsel, from Michigan and Indiana, also brought a record of trial experience to the plaintiffs' team, and exhibited these skills, while assisting in the difficult job of managing this lawsuit.

The ability of these attorneys is further demonstrated by their success when opposed by talented, nationally recognized law firms. Uniroyal utilized a leading local law firm, one of the nation's noted management-industrial relations firms, corporate counsel, and other skilled negotiators on its behalf. From this, the Court concludes that the level of experience, reputation, and ability of the attorneys supports some upward adjustment of the "quality" aspect of this fee award.

2. *Results Obtained*

Any inquiry into the quality of the representation must take into account the fourth factor enumerated in *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*, the amount involved and the results obtained.

In *Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555, 563 (7th Cir. 1975), the court stated:

> The amount that an attorney can expect to receive as a fee for prosecuting a case . . . is necessarily related . . . to the amount actually recovered. It is also related in some degree to the amount that could realistically have been hoped to be recovered.

*Accord, Williams* v. *General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974).

In this case, the amount recovered must also take into account the equitable relief obtained. In *Copeland*, it was stated:

> It is important again to emphasize that a huge dollar recovery does not itself justify a huge fee award. The "lodestar" itself generally compensates lawyers adequately for their time. An upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client. For example, if a substantial monetary judgment was to be *expected*, that expectation normally is

> reflected in the hourly rate used to compute the "lodestar," and no further adjustment would be necessary.

23 FEP Cases at 976 (emphasis in original.)

Acknowledging the results obtained would not be complete without recognizing the impact of this lawsuit on the Department of Labor. The actions by the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures. This mechanism will continue to operate, vindicating the rights of other employees and effectuating the congressional intent behind both Title VII and the Executive Order.

The magnitude of the financial recovery is not a determinative factor, merely one to be considered by the Court. The large amounts involved do not add to the complexity of the problems, increase the responsibilities or require greater capabilities of counsel. Petitioners request $1.5 million as the proper quality adjustment. They justified this figure by contending that their hourly rate multiplied by the number of hours is approximately $1.5 million. The petitioners also suggest that if the court is unpersuaded by that contention, the smallest quality adjustment should be $475,800, a figure calculated by taking 10% of the immediate cash recovery obtained, $4,758,000. Defendant Uniroyal contends that no quality adjustment should be paid. They argue that the government, not the petitioners, forced the large settlement.

## CONCLUSIONS

For the reasons previously stated, and in light of the Court's evaluation of the proper hourly rate and compensable hours, the Court now awards the following amounts: For the overall risk of non-recovery, $50,000, and for the quality of the representation, $200,000. These amounts will be added to the lodestar figure of $583,679 established in Part III of this order, for a total of $833,679. A total fee which we believe is reasonable in light of all the factors involved.

Borrowing from Judge Bauer in *Arenson* v. *Board of Trade of City of Chicago, supra,* at 1359, this award, "is meant to adequately compensate them for initiating this significant litigation and negotiating such a beneficial settlement . . . ; yet . . . this award is not meant to provide a windfall to the plaintiffs' attorneys."

At the hearing on attorneys' fees, the petitioners' lead counsel advised the Court that payment of this fee could be made in a lump sum to all of the attorneys involved. With this in mind, the Court's breakdown of the fees may be considered advisory, and final distribution is left to the discretion of the attorneys involved.

One final note is required before closing. Defendant Uniroyal requested and was granted three months' additional time to answer the petition for fees. When the hearing was held on this application, it was obvious that sorting out the legal theories and facts involved would take a substantial amount of time, even if this decision is not appealed. Defendant Uniroyal has admitted liability for fees of at least $290,000, and, at a hearing on the matter of these fees, counsel for defendant accepted the Court's suggestion that an interim payment of $300,000 be made at that time to the petitioners. That payment was made, without any prejudice

to Uniroyal's rights in this matter, and that sum of $300,000 should be set off against the total amount of fees herein awarded the attorneys for plaintiffs. After credit is given for that interim payment of $300,000, the net amount now due petitioners is $533,679. Judgment will be entered for that amount.

So ordered.

ENTER: March 6, 1981.

ROBERT A. GRANT

Robert A. Grant
U. S. District Judge

# JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF INDIANA

Civil Action File No. S72-243

ALTA CHRAPLIWY, et al

*vs.*

UNIROYAL, INC., et al

JUDGMENT

This action came on for (hearing) before the Court, Honorable ROBERT A. GRANT, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered for petitioners in the amount of $833,679. Payment in the sum of $300,000 was made by defendant before judgment and the same is set off against the total amount of fees herein awarded the attorneys for the petitioners. Therefore, payment is due in the net amount of $533,679.

Dated at SOUTH BEND, INDIANA,
this 6th day of MARCH, 1981.

RICHARD E. TIMMONS
Clerk of Court

By TMISE M. HICKLE
Deputy Clerk

# APPENDIX C

Opinion by Judge Fairchild

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 16, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

| | |
|---|---|
| ALTA CHRAPLIWY, et al.,<br>Plaintiffs-Appellants and<br>Cross-Appellees,<br>Nos. 81-1557 and 81-1633<br><br>vs.<br><br>UNIROYAL, INC., a corporation,<br>Defendant-Appellee and<br>Cross-Appellant. | Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.<br><br>No. S72-C-0243<br>Judge<br>Robert A. Grant |

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, and REVERSED and REMANDED in part, with costs on appeal, including attorney's fees, allowed to appellants, in accordance with the opinion of this Court filed this date.

* Senior District Judge Wesley E. Brown of the District of Kansas sitting by designation.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

APRIL 13, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

| | |
|---|---|
| ALTA CHRAPLIWY, et al., Plaintiffs-Appellants and Cross-Appellees, Nos. 81-1557 and 81-1633<br>vs.<br>UNIROYAL, INC., a corporation, Defendant-Appellee and Cross-Appellant. | Appeal from the United States District Court for the Northern District of Indiana, South Bend Division<br>No. S72-C-0243 ROBERT A. GRANT, Judge. |

### ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc*, all members of the original panel having voted to DENY rehearing, and no judge in regular active service having requested a vote on the *en banc* suggestion,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

On March 1, 1982, plaintiffs filed a motion that we specify in our mandate that interest on the attorney's fees awarded shall accrue as of the date of the initial district court decision, March 6, 1981. Defendant has responded.

* Senior District Judge Wesley E. Brown of the District of Kansas is sitting by designation.

Plaintiffs correctly remind us that Rule 37, F.R.A.P. requires that our mandate contain instructions with respect to allowance of interest. This order will be included in our mandate.

Judgment was entered March 6, 1981 in the net amount of $533,679. It reflected three components: (a) an initial amount of $583,679 (of which $300,000 had been paid before entry of judgment), and, as we understand, $283,679 has been paid, with interest, pursuant to our order entered November 17, 1981); (b) a quality allowance of $200,000; and (c) a risk allowance of $50,000.

Our decision affirmed the $50,000 risk allowance, and interest should accrue on it from March 6, 1981 until paid.

Our decision required an increase in the initial amount to "close to the $1,510,768 for which plaintiffs contend, subject to minor adjustments" to be determined by the district court. We direct that interest on the initial amount as redetermined by the district court (after crediting amounts thereof already paid) shall begin to accrue as of 28 days after the date of this order (that being 21 days after the date our mandate will normally issue under Rule 41, F.R.A.P.).

Our decision left to the district court the question whether an adjustment is required in the $200,000 quality allowance and the amount of any such adjustment. We direct that interest on the quality allowance shall begin to accrue on the date of the new district court judgment determining that question.

We have considered *Harris* v. *Chicago Great Western Railway Co.*, 197 F.2d 829 (7th Cir. 1952), relied on by defendant. The facts are different and *Harris* does not require us to reach a different result.

Plaintiffs' motion is granted in part and denied in part, as herein set forth.

Office - Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2135

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

**UNIROYAL, INC.,**

*Petitioner,*

v.

**ALTA CHRAPLIWY, *et al.*,**

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In its Petition for Certiorari, Uniroyal, Inc. did not have the benefit of the recent decision of the United States Court of Appeals for the District of Columbia in *Donnell* v. *United States*, No. 81-1471 (D.C. Cir. June 25, 1982).[1] For the reasons herein, Uniroyal submits that the *Donnell* decision increases the importance of review of the instant cause by this Court and requires reversal of the decision below.

[1] A copy of the *Donnell* decision is appended hereto as Appendix E.

In the *Donnell* decision the D.C. Circuit dealt squarely with one of the two issues central to the attorneys' fee award in the instant case—how to set a reasonable hourly rate under a fee award statute when lawyers come from out of town to litigate a lawsuit. In the instant case, Plaintiffs retained counsel from the District of Columbia to represent them in a suit in South Bend, Indiana. In *Donnell,* the converse was true, counsel from Mississippi brought suit in the District of Columbia. In both situations, however, the issue is precisely the same—whether the relevant community for purposes of setting a reasonable prevailing hourly rate is the community where the suit was brought or the community where the lawyer resides.

Noting the importance of a rule which would be both neutral in its application and easy and straightforward for the district courts to administer in the myriad of fee award determinations now required by the courts, the Court of Appeals held that the appropriate community for setting prevailing hourly rates is the one in which the lawsuit is brought.

> We recognize the logic on both sides of the argument, but hold that *the proper rule is that the relevant community is the one in which the district court sits.* This is a simple rule to follow. It requires the district court normally to determine only the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise. Moreover, it is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them. *High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there.* Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated.

Appendix at E-19; emphasis added.

The Court of Appeals further held that for purposes of applying this rule it was irrelevant where the attorneys' work was actually performed.

> Although there may be cases, such as this one, where much of the work must be performed away from the district court's community, we do not believe that this alone provides a sufficient reason for deviating from the general rule. This position is consistent with that of other federal courts.

Appendix at E-19; footnote omitted.[2]

In contrast, the court below tipped the scales in the opposite direction and held that when any doubt exists concerning which legal community should be considered in setting "the fee customarily charged in the locality for similar legal services" preference should be given to the locality where counsel normally practices. Appendix at A-13-17.[3] Thus, the decision of the court below appears to

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[2] Among the decisions which were cited as being consistent with the D.C. Circuit's rule was *McPherson* v. *School Dist # 186*, 465 F. Supp. 749 (S.D. Ill. 1978), a decision relied on by the trial court in the instant case in awarding South Bend rates to D.C. counsel.

[3] The *Donnell* court sought to distinguish the Seventh Circuit's holding as applying only to those cases where there are "compelling reasons why the services performed by that [out of town] attorney were unavailable within the court's jurisdiction." Appendix at E-19. We submit, however, that the Seventh Circuit's decision below cannot and will not be so narrowly construed by the district courts particularly inasmuch as the trial court below had made no finding that competent counsel was unavailable within its jurisdiction. The Seventh Circuit merely stated that there was "no suggestion" in the district court's opinion that competent counsel was in fact available locally, and therefore inferred that local counsel was not capable of representing the Plaintiffs in this action. This inference was entirely unwarranted given the absence of any finding whatsoever by the district court.

be squarely in conflict with the decision of the D.C. Circuit in *Donnell* as well as the decision of the Eighth Circuit in *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305 (8th Cir. 1981), wherein the proper standard in fee awards was deemed to be "the rates charged by attorneys of like skill and for similar work in the general locality in which the litigation takes place." 643 F.2d at 1313.

Uniroyal submits that the standard enunciated by the D.C. Circuit and the Eighth Circuit is the only proper standard because it establishes a neutral rule which is fair to the litigants as well as their attorneys. Under this standard, all parties are aware from the outset of the litigation what criteria their potential fee award or fee liability will be based upon at the conclusion of the lawsuit. As pointed out by the D.C. Circuit, this rule will greatly ease the administration of fee awards by the district courts. Once the scale of reasonable hourly rates is determined within a jurisdiction, there will be no need for the submission of countervailing affidavits and testimony when a fee award is in dispute.

Thus, there is a clearcut conflict between the decision below and that of other Circuits as to the manner in which reasonable hourly billing rates should be determined in attorneys' fees disputes under Title VII and the fee award provisions of other statutes. This is an important question applicable to employment discrimination litigation which has not been, but should be, decided by this Court. There-

fore, and for the reasons previously set forth in its Petition for Certiorari, Uniroyal respectfully submits that this Court should grant certiorari in the instant case.

Respectfully submitted,

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-1471

CLYDE R. DONNELL, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

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No. 81-1545

CLYDE R. DONNELL, ET AL.

v.

UNITED STATES OF AMERICA
EDDIE THOMAS, SR., ET AL., APPELLANTS

---

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-0392)

---

Argued 26 February 1982

Decided 25 June 1982

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Gerald Braddock* of the bar of the Supreme Court of Mississippi, *pro hoc vice* by special leave of the Court, and *George C. Cochran*, for Donnell, et al., appellants in No. 81-1471 and cross-appellees in No. 81-1545. *Douglas C. Herbert, Jr.* and *F. Joseph Nealon* also entered appearances for Donnell, et al.

*Frank R. Parker* with whom *William L. Robinson* was on the brief for Eddie Thomas, Sr., et al., appellees in No. 81-1471 and cross-appellants in No. 81-1545.

*Walter W. Barnett*, Attorney, Department of Justice, entered an appearance for appellee, United States of America.

Before: TAMM and WILKEY, *Circuit Judges*, and GESELL,* *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This is an appeal from the district court's award of $73,669.88 in attorneys' fees to appellees, defendant-intervenors below in a suit under section 5 of the Voting Rights Act.[1] Appellants challenge the intervenors' entitlement to any fees at all, as well as the court's particular determinations in calculating the award. Appellees have cross-appealed, arguing that the district court erred in choosing the geographical market for determining the appropriate hourly rate. We find merit in both positions, and reverse and remand to the district court for further proceedings.

## I. BACKGROUND

### A. *The Merits Litigation*

In 1970 the Board of Supervisors of Warren County, Mississippi, adopted a redistricting plan which failed to

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] 42 U.S.C. § 1973c (1976).

receive approval of the United States Attorney General and ultimately was enjoined by the District Court for the Southern District of Mississippi because it diluted black voting strength.[2] In 1978 the Board adopted a new plan. Rather than seeking approval of the Attorney General, the Board brought an action against the United States in the District Court for the District of Columbia seeking a declaratory judgment that the new plan did not have a racially discriminatory purpose or effect. Seven black voters in Warren County intervened on the side of the United States.

After a year and a half of discovery, the district court ruled on 31 July 1979 that plaintiffs were not entitled to a declaratory judgment. The court held that the Board had failed to provide a legitimate nonracial justification for its plan, which would diminish black voting strength. On 19 February 1980 the Supreme Court summarily affirmed.[3]

Subsequently a new private action was filed in the District Court for the Southern District of Mississippi challenging the preexisting voting districts. Finding the districts unconstitutional, the district court imposed a plan proposed by the Department of Justice.[4] In elections held under this plan several black officials were elected.

B. *Award of Attorneys' Fees to Intervenor-Defendents*

On 1 May 1980 intervenors filed a motion for an award of $89,109.38 in attorneys' fees pursuant to Title 42, section 1973*l*(e), which authorizes the district court

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[2] *See United States* v. *Board of Supervisors*, 429 U.S. 642 (1977).

[3] *Donnell* v. *United States*, Civ. No. 78-0392 (D.D.C. 31 July 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1059 (1980).

[4] *Stokes* v. *Warren County Election Comm'n*, Civ. No. J79-0425(c) (S.D. Miss. 20 Sept. 1979).

to award a reasonable fee to the prevailing party.[5] The request covered 381.05 hours worked by lead counsel Frank Parker, chief counsel for the Jackson, Mississippi, office of the Lawyers' Committee for Civil Rights Under Law; 191.35 hours worked by James Winfield, a practitioner in Vicksburg, Mississippi; 47 hours worked by Richard Kohn, an attorney with the Lawyers' Committee's Washington, D.C., office; and 30 hours worked by Barbara Phillips, a Lawyers' Committee attorney who worked on the attorneys' fees application. Parker and Kohn requested an award at the rate of $100 per hour, Winfield at the rate of $77 per hour, and Phillips at the rate of $75 per hour; the requested rates for Parker and Kohn were based on the District of Columbia market, whereas the markets relied on by Winfield and Phillips were not specified. Multiplying rates by hours resulted in a lodestar of $59,406.25. In addition, intervenors requested an upward adjustment of the lodestar by a factor of fifty percent, which would produce a total of $89,109.38.

Appellants opposed the request on several grounds, and also requested an evidentiary hearing, which the district court denied. On 19 February 1981 intervenors were awarded $50,400 in attorneys' fees. The court found that the relevant geographical market was Mississippi rather than the District of Columbia, and awarded hourly rates it found prevailing in Mississippi: $60 an hour for Parker and Kohn, $50 an hour for Winfield, and $40 an hour for Phillips. The court allowed all hours claimed by all attorneys, except for 9.2 hours of deposition time claimed by Winfield but specifically contested in affidavits filed by appellants. The court then increased the lodestar figure by fifty percent, citing the contingent nature of the representation, the novel issues presented in the case, and the attorneys' unusually high quality of representation.

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[5] 42 U.S.C. § 1973*l*(e) (1976).

Intervenors subsequently sought reconsideration of the award based on recent decisions allowing hourly rates in Mississippi in excess of those allowed in the original decision. On 20 March 1981 the court amended its award by increasing the hourly rate for Parker and Kohn to $85 per hour and for Winfield and Phillips to $60 per hour. The court's ruling on the number of hours expended and on the adjustment to lodestar remained the same, resulting in a total award of $73,699.88.

This appeal followed. Appellants challenge intervenors' entitlement to any award, as well as the reasonableness of the hours worked by Winfield, Parker, and Kohn, the hourly rates awarded by the district court, and the fifty percent adjustment factor. Intervenors, appellees here, have cross-appealed on the issue of the hourly rates. They assert that the court erroneously used Mississippi rates rather than rates in the District of Columbia, where the suit was brought.

We now reverse and remand to the district court for further proceedings.

## II. Entitlement To Fees

Title 42, section 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[6]

The purpose of this provision, as well as of section 1988,[7] a similar provision providing for award of attorneys' fees to prevailing parties in civil rights cases generally, is

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[6] *Id.*

[7] *Id.* § 1988. The legislative purposes underlying § 1988 and § 1973*l*(e) are identical, and the two therefore should be construed similarly. *See, e.g., Riddell* v. *National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980).

the familiar one of encouraging private litigants to act as "private attorneys general" in seeking to vindicate the civil rights laws. As the Senate Report on section 1973*l*(e) stated, "Congress depends heavily upon private citizens to enforce the fundamental rights involved. The awards are a necessary means of enabling private citizens to vindicate these Federal rights." [8] Although awarding fees pursuant to section 1973*l*(e) is discretionary, the legislative history makes clear that a prevailing party usually should recover fees: "A party seeking to enforce the rights protected by the Constitutional clause or statute under which fees are authorized by these sections, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." [9]

Had this been a successful suit by these intervenors as plaintiffs against the Board of Supervisors, then, their entitlement to attorneys' fees would hardly be in doubt. The result of the litigation furthered the purpose of the Voting Rights Act. This case presents a more difficult problem, however, because the suit was brought by the Board of Supervisors against the United States, as represented by the Department of Justice. Intervenors participated on the side of the Department of Justice, but the significance of their efforts is in controversy. Appellants contend that intervenors' participation was subordinate and indeed unnecessary. They believe that the Department of Justice needed no aid in defending the suit, and prevailed on the basis of its own efforts. In appellants' view this duplicative role constitutes a "special circumstance" that renders an award of fees unjust. Intervenors counter that their aggressive litigation efforts impelled the Department of Justice into a strong defense,

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[8] S. REP. No. 295, 94th Cong., 1st Sess. 40 (1975).

[9] *Id.*

and that they produced facts and arguments of substantial value to the district court.

The legislative history of section 1973*l*(e) is silent on the appropriate standard for awarding attorneys' fees to intervenors who participate on the side of the United States in a successful suit. There is a single reference to attorneys' fees for such a party: "In the large majority of cases the party or parties seeking to enforce [civil] rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases (*e.g.*, a declaratory judgment suit under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors." [10] This indicates that intervenors may be considered as prevailing parties entitled to an award of attorneys' fees. But we do not believe Congress intended that such an award be as nearly automatic as it is for a party prevailing in its own right.

In the first place, the legislative history of sections 1973*l*(e) and 1988 emphasizes over and over again the critical goal of enabling private citizens to serve as "private attorneys general" in bringing suits to vindicate the civil rights laws. A typical statement of this purpose was made by Representative Holtzman during the House debates on the Civil Rights Attorneys' Fees Awards Act of 1976, which enacted section 1988:

> Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people. The organizations who have helped them bring their cases are frequently not well financed. The Justice Department does not have the resources to bring suit for every civil rights violation. Thus, many people, deprived of their civil rights, may not as a practical matter be able to do

[10] *Id.* at 40 n.42. Likewise, the legislative history of § 1988 contains only this one reference to fees for intervenors. *See* S. REP. No. 1011, 94th Cong., 2d Sess. 4 (1976).

> anything about it. It is not right to deny people who cannot afford to pay attorneys' fees the availability of justice through our courts.[11]

We think appellants have a valid point that this objective is far less compelling when the actual Attorney General participates in the case. Indeed, when the Justice Department defends a suit under section 5 it is acting on behalf of those whose rights are affected. It cannot be said that rights are being denied because of inability to pay attorneys' fees.

Appellees respond that their role differed from that of the Justice Department because their interests as voters in Warren County differed from the Department's interest as a whole. While there may be instances in which such a divergence exists between a defendant and a defendant-intervenor,[12] this was not the case here. The

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[11] 122 CONG. REC. 35127 (1 Oct. 1976) (remarks of Rep. Holtzman).

[12] For example, in *Baker* v. *City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980), defendant-intervenors black police officers recovered attorneys' fees for their role in successfully defending a suit brought by the police officers' union against Detroit challenging an affirmative action plan voluntarily adopted by the city. The court noted that the city would be reluctant to admit that it had in the past discriminated against black officers, a reluctance which might impair its defense of the affirmative action plan.

A similar, and even more significant, case is *Seattle School Dist. No. 1* v. *Washington*, 633 F.2d 1338 (9th Cir. 1980), *prob. juris. noted*, —— U.S. ——, 102 S. Ct. 384 (1981). A school district sued to have a state initiative, which had the effect of outlawing the district's voluntary school desegregation program, declared unconstitutional under the fourteenth amendment. Eight public interest groups intervened in support of the district, and raised the alternative argument that the district operated an unconstitutional dual school system. The district court found the initiative unconstitutional, but subsequently refused to award any attorneys' fees to intervenors. The Ninth Circuit affirmed on the merits and partly reversed on the fees issue. It held that intervenors were entitled to fees on the second issue, since the school district,

interest of both the Attorney General and appellees was in preventing a dilution of black voting strength. We will not lightly infer that the Justice Department has violated this statutory obligation. In discussing the court's power to prevent intervention in proceedings for a declaratory judgment under section 4(a) of the Voting Rights Act, which is parallel to the provision in section 5, Judge Leventhal held for a three-judge district court:

> Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention . . . in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest.
>
> However, if the Attorney General has been derelict or deficient, if the fact-finding process is warped or inadequate, the court has the authority and indeed may have the duty to allow intervention to cure or leave the deficiencies. Such intervention is not to be permitted except upon a strong showing.[13]

Not only is it assumed that the Attorney General will represent the interest of black voters, but the outcome of

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like the city of Detroit in *Baker*, would not have raised the argument that the system was unconstitutional. But the Ninth Circuit affirmed the district court's decision to deny fees on the first issue in the case, which was adequately covered by the school district. *See id.* at 1349. The Ninth Circuit thus held, as we do today, that intervenors may be denied fees where their participation was unnecessary in light of the efforts of the prevailing governmental litigant.

[13] *Apache County* v. *United States*, 256 F. Supp. 903, 908 (D.D.C. 1966) (three-judge court). *See also NAACP* v. *New York*, 413 U.S. 345, 368 (1973) (upholding refusal to allow intervention where motion to intervene was untimely, noting that appellants did not substantiate their claim that the United States inadequately represented their interests).

a declaratory judgment suit under section 5 does not bind private parties. Section 1973c provides that "a declaratory judgment entered under this section shall [not] bar a subsequent action to enjoin enforcement of [the voting] qualification, prerequisite, standard, practice, or procedure." [14] This further buttresses Judge Leventhal's point that the need for intervention in a declaratory judgment suit is quite limited. To adopt a standard that would permit an award of attorneys' fees in every case in which an intervenor participated on the side of the Department of Justice in a successful suit would encourage intervention even where there is no special need for it. It may be that the district courts have gotten away from Judge Leventhal's admonition and have been permitting intervention as a matter of course, but this is only an additional reason for carefully evaluating intervenors' fee requests.

Given this background, we believe that in considering an intervenor's request for attorneys' fees the district court is obligated to examine the particular role played by the intervenor in the lawsuit. Although this question has not been definitely resolved before today, analogous holdings have been laid down. Courts have held that one type of "special circumstance" that creates an exception to the ordinary presumption in favor of granting attorneys' fees to a prevailing party is "where, although plaintiffs received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results." [15] An example is where a lawsuit was filed to achieve an objective that was already being achieved independently.[16]

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[14] 42 U.S.C. § 1973c (1976).

[15] *Connor* v. *Winter*, 519 F. Supp. 1337, 1343 (S.D. Miss. 1981) (three-judge court).

[16] *See, e.g., Bush* v. *Bays*, 463 F. Supp. 59, 66 (E.D. Va. 1978) (holding alternatively that plaintiffs were not prevailing parties and that an award would be unjust under the "special circumstances" doctrine) ("It is apparent to the

We think the same principle applies here as well. If a lawsuit is successful, but the intervenor contributed little or nothing of substance in producing that outcome, then fees should not be awarded.[17]

This holding is fully consistent with the few instances in which private parties have recovered fees under section 1988 even though a governmental entity was litigating on their side. In *Wade* v. *Mississippi Cooperative Extension Service*,[18] for example, the losing party challenged the *plaintiffs'* entitlement to fees on the theory that the Justice Department, as plaintiff-intervenor, had done the bulk of the work. The court awarded fees to plaintiffs after finding that "counsel for the private plaintiffs, instead of playing a passive role, actively participated throughout in the prosecution of the case, assumed a great measure of responsibility for presenting evidence and independently prepared and submitted various legal memoranda of value to the court."[19] This is precisely the kind of determination we hold the district court must make if fees are to be awarded.[20]

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Court that the attorneys for the plaintiffs in this case merely caught hold of a train on its way out of the station and are seeking to ride it to a substantial award of attorneys' fees. Plaintiffs' lawsuit played no part in firing the boiler, getting up a head of steam, or opening the throttle. Plaintiffs just went along for the ride.")

[17] The Ninth Circuit has agreed that fees may be denied intervenors under these circumstances. *See* note 12 *supra*.

[18] 378 F. Supp. 1251 (N.D. Miss. 1974), *vacated on other grounds*, 528 F.2d 508 (5th Cir. 1976), *award reinstated on remand*, 424 F. Supp. 1242 (N.D. Miss. 1976).

[19] *Id.* at 1254. Cases such as *Wade*, where the private parties brought the suit and the governmental entity later intervened, obviously present a stronger case for award of fees. *See also United States* v. *Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973) (award of fees to plaintiff in Title VII suit, which was joined by Attorney General).

[20] Other courts making awards in similar circumstances have also treated the entitlement issue as open, rather than

Our holding is also consistent with this court's refusal in *Alabama Power Co.* v. *Gorsuch*[21] to award attorneys' fees to an intervenor participating on the side of the Environmental Protection Agency (EPA), which prevailed in a suit brought by industry petitioners. As Chief Judge Robinson stated for the court:

> If ever an intervenor can recover attorneys' fees from a party on whose side it participated—a question we do not here reach—the justification would have to be a clear showing of some unique contribution of the intervenor to the strength of that party's legal position. Here, the environmental groups have not demonstrated with any sort of particularity that their intervention added in any essential way to EPA's stance on the issues involved. Without deciding more, we hold that wherever the bounds on fee awards to such intervenors should be set, this threshold burden has not been met.[22]

In *Alabama Power* the intervenors sought an award from the EPA, the very governmental entity that had prevailed in the suit, whereas here intervenors seek attorneys' fees from appellants, who lost the suit. Nonetheless, we believe that the essential principle is the same

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holding, as appellees would have us do here, that being on the successful side is sufficient for obtaining an award of fees. *See, e.g., Northcross* v. *Bd. of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979) (upholding award of fees to plaintiffs, who were joined in action by governmental entity, because specific finding by district court "disposes of any suggestion that the services . . . were not essential"), *cert. denied*, 447 U.S. 911 (1980). *See also Usery* v. *Local Union No. 639 Int'l Bhd. of Teamsters*, 543 F.2d 369, 388 (D.C. Cir. 1976) upholding authority to award fees to intervenors under Labor-Management Reporting and Disclosure Act because "[t]he efforts of union member intervenors may be of considerable assistance to the court and the Secretary, warranting assessment against the party ultimately benefitted—the union membership"), *cert. denied*, 429 U.S. 1123 (1977).

[21] 672 F.2d 1 (D.C. Cir. 1982).

[22] *Id.* at 4.

in both situations. Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation. This inquiry primarily entails determining whether the governmental litigant adequately represented the intervenors' interests by diligently defending the suit. It also entails considering both whether the intervenors proposed different theories and arguments for the court's consideration and whether the work it performed was of important value to the court.

By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to an easy award of attorneys' fees. Obviously, if an intervenor did nothing but simply show up at depositions, hearings, and the trial itself, and spend lots of time reading the parties' documents, an award of attorneys' fees would be inappropriate. The same would be true if the intervenors' submissions and arguments were mostly redundant of the Government's or were otherwise unhelpful. We do not say that this is true of intervenors here, but only that the district court should find out and assess the significance of their efforts in the case.

The court failed to make this determination, leaving the parties' vigorous dispute unresolved. Appellants claim that intervenors contributed nothing the Government did not also contribute, pointing as an example to intervenors' failure to submit their own proposed findings of fact and conclusions of law. Intervenors contend that the Justice Department's proposed findings and conclusions were the product of both the Department and intervenors, and in general they argue that their efforts were critical in forcing the Justice Department to conduct an active defense. On remand the district court

should resolve this controversy and determine if fees are appropriate.

## III. Calculation of the Fees

In this section we deal with the challenges raised by both parties to the district court's calculation of the amount of fees awarded. Of course, if the district court on remand finds that intervenors are not entitled to any fees, the discussion in this section will become moot.

### A. *Hours Reasonably Expended*

Appellants challenge the number of hours attorneys for appellees claim to have worked on this case, asserting primarily that there was substantial duplication among the tasks performed by the three attorneys who worked on the merits of the litigation.[23] In particular they challenge the billing hours attributed to Winfield, the local Mississippi attorney for appellees. For example, appellants note that twenty-five entries by Winfield of time spent analyzing various documents are identical to those reported by lead counsel Parker. Based on this, appellants claim that the district court should conduct an evidentiary hearing to determine not only whether these entries were indeed duplicative and unnecessary, but also whether Winfield performed any substantial function in the proceedings at all. In addition, appellants allege that the time spent by Kohn, the District of Columbia counsel, was unnecessary, and that Parker also spent an excessive amount of time on the case.

The district court brushed off these objections summarily:

> Intervenors' attorneys provided detailed records of the time logged and services rendered. The Court has examined them carefully and finds that they are

[23] The hours worked by Phillips on the attorneys' fees application are not in controversy.

> reasonable. The duplication of hours between attorneys for certain work, which was pointed out by the plaintiffs, does not concern the Court. This case was a complicated one entailing extensive document work. It necessarily involved some duplication of effort by the attorneys so that each could understand the case properly.[24]

The court went on to approve all hours submitted, with the exception of 9.2 hours submitted by Winfield for time spent at depositions, where the plaintiffs had submitted affidavits from the deponents stating that Winfield was not present.

We find no fault with the district court's decision to allow all the hours claimed by Kohn and Parker. The only challenge appellants have raised with regard to Kohn is that his role was entirely redundant. But we believe it was reasonable for appellees to have an attorney in Washington, D.C., who was prepared to take whatever actions might be necessary in the district court. The hours submitted by Kohn seem reasonable, and given the absence of any particular challenge by appellants we can find no problem with the court's decision.

Appellants similarly have failed to specify their challenges to Parker's claimed hours. We emphasize that the party challenging an application for fees should frame its objections with specificity. The district court cannot inquire into the reasonableness of every action taken and every hour spent by counsel, and it will consider objections to filed hours only where it has been presented with a reasonable basis for believing the filing is excessive.[25]

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[24] Civ. No. 78-392, memorandum opinion (mem. op.) at 4 (D.D.C. 18 Feb. 1981).

[25] *See generally National Ass'n of Concerned Veterans* v. *Secretary of Defense*, Nos. 81-1364 & 81-1424, slip op. at 16-19 (D.C. Cir. 23 Apr. 1982); *Copeland* v. *Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc).

No such basis exists here, and we uphold the decision regarding Parker's hours.

We find that the district court erred, however, in refusing to inquire into the matter of hours worked by Winfield. In *Copeland* v. *Marshall* we stated: "It is axiomatic that we cannot identify an unreasonable award unless it is accompanied by a statement of reasons."[26] In this instance appellants raised specific and substantial questions about Winfield's hours worked, yet the district court never stated specifically why it found no merit in appellants' claims. Although the court may be correct that a complicated case "necessarily involves some duplication of effort," that rationale cannot be dispositive. The submission of so many identical time entries inevitably raises questions about exactly what the attorneys did and whether it was necessary. And given the different roles played by Winfield and Parker, their submission of identical time records for analyzing these many documents presents the question whether such extensive duplication was warranted.[27]

This is especially true given the prior question whether intervenors played a necessary role in this case at all. Even if the district court finds that intervenors' participation in the case was important and substantial, there yet remains the question whether this participation needed to be so extensive given the central role played by

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[26] 641 F.2d 880, 901 n.39 (D.C. Cir. 1980) (en banc).

[27] The issue is not whether intervenors used too many attorneys, but whether the work performed was unnecessary. *See, e.g., Tasby* v. *Estes*, 651 F.2d 287, 289 (5th Cir. 1981). Even if there was justification for the use of three attorneys performing different roles, that does not necessarily imply that every attorney needed to read every document in the case. And the existence of numerous identical time submissions raises a question whether each attorney actually did read every document or whether each attorney had an accurate understanding of his particular role in the litigation.

four attorneys from the Department of Justice.[28] Appellants have raised compelling questions regarding Winfield's participation, particularly in light of the leading and sometimes almost exclusive role Parker assumed on behalf of intervenors. Parker is an extremely experienced voting rights attorney, and he has participated extensively in Mississippi litigation. Even if some additional local expertise was needed, which was intervenors' justification for Winfield's participation in the litigation, there is an open question whether there was a need for the local attorney to read every document and otherwise act as a major co-counsel. The fact that Winfield's time submissions in a great many instances are identical to those of Parker only adds to the need for an investigation of this issue.

In *National Association of Concerned Veterans* v. *Secretary of Defense*[29] this court emphasized that in most cases questions regarding an attorneys' fee application can be resolved without an evidentiary hearing. We also held, however, that "procedural fairness requires that a hearing be held where in the District Court's view material issues of fact that may substantially affect the size of the award remain in well-founded dispute."[30] We hold that the district court abused its discretion in summarily resolving the issues with regard to Winfield's time submission. On remand an evidentiary hearing should be held to determine the reasonableness of the time charges submitted by Winfield. The district court should consider any specific challenges by appellants to Winfield's participation, such as their objections to the duplicative entries

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[28] *Cf. Baker* v. *City of Detroit*, 504 F. Supp. 841, 851 (E.D. Mich. 1980) (awarding fees to intervenors, noting "that this sum should not be onerous" because "intervenors did not take part in most pre-trial discovery" and "played a subsidiary role [at trial]").

[29] Nos. 81-1364 & 81-1424 (D.C. Cir. 23 Apr. 1982).

[30] *Id.*, slip op. at 18.

and to the generalized billing of twenty hours for time spent with clients.

B. *Reasonable Hourly Rate*

Both parties have appealed on the hourly rate issue. Appellants challenge the rates awarded as excessive. The court initially awarded $60 per hour for Parker and Kohn, $50 per hour for Winfield, and $40 per hour for Phillips. It subsequently increased these rates to $85 per hour for Parker and Kohn and $60 per hour for Winfield and Phillips. This increase was in response to intervenors' motion for reconsideration based on recent decisions award attorneys' fees for litigation in Mississippi. Although appellees thus were awarded rates in excess of those appellants claim are the maximum for experienced attorneys in Mississippi, appellees have cross-appealed claiming that the district court should have based their fees on the customary rates charged in the District of Columbia, where the lawsuit was filed.

We uphold the cross-appeal with regard to Parker, Kohn, and Phillips, finding that these attorneys are entitled to rates customarily charged in the District of Columbia. On remand the district court should determine the hourly rates to be awarded to these three attorneys. We hold that Winfield's rates should be determined on the basis of the prevailing market rate in Mississippi, as his participation in the case was premised entirely on his local expertise. We vacate the district court's award of $60 per hour to Winfield, and remand for a new determination of his appropriate hourly rate.

*Copeland* v. *Marshall* held: "The reasonable hourly rate is that prevailing in the community for similar work."[31] Usually no problem arises in choosing the relevant community because the lawyers work in the community in which the suit was brought. The difficulty arises when

[31] 641 F.2d at 892.

lawyers come from out of town to litigate the suit. The issue here is whether the relevant community is the District of Columbia, where the suit was brought, or Mississippi, which was the source of the controversy at issue and the place where most of the work was performed.

We recognize the logic on both sides of the argument, but hold that the proper rule is that the relevant community is the one in which the district court sits. This is a simple rule to follow. It requires the district court normally to determine only the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise. Moreover, it is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them. High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated. Although there may be cases, such as this one, where much of the work must be performed away from the district court's community, we do not believe that this alone provides a sufficient reason for deviating from the general rule. This position is consistent with that of other federal courts.[32]

There are some situations, however, in which the rule should not be followed. Courts have held that the hourly rate of the Lawyer's community, as opposed to the district court's community, should be awarded if there are compelling reasons why the services performed by that attorney were unavailable within the court's jurisdiction. For example, the Seventh Circuit has stated:

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[32] *See, e.g., McPherson* v. *School Dist. #186*, 465 F. Supp. 749, 760 (S.D. Ill. 1978); *Donaldson* v. *O'Connor*, 454 F. Supp. 311, 314 (N.D. Fla. 1978) (citing cases).

> If a high priced, out of town attorney renders services which local attorneys could do as well, and there is no other reason to have them performed by the former, then the judge, in his discretion, might allow only an hourly rate which local attorneys would have charged for the same service. On the other hand, there are undoubtedly services which a local attorney may not be willing or able to perform. The complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally.[23]

Thus, if a *particular* attorney's services are necessary, the proper hourly rate is that prevailing in that attorney's local community.

Applying these criteria to this case, we find that Parker, Kohn, and Phillips should have been awarded District of Columbia hourly rates. Kohn served entirely as Washington, D.C., counsel, and thus D.C. rates are entirely appropriate. Parker served as lead counsel, making him responsible for all intervenors' positions in the case, including at the trial itself. Although he works primarily out of Mississippi, his role in the litigation extended to the trial in D.C. as well as the gathering of evidence in Mississippi. District of Columbia rates are therefore appropriate. Finally, Phillips is also entitled to D.C. rates, even though she works in the Lawyers' Committee's Mississippi office. Her function of preparing the attorneys' fees application was directed entirely toward convincing the district court, and it could have been done by any local District of Columbia attorney.

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[23] *Chrapliwy* v. *Uniroyal, Inc.*, Nos. 81-1557 & 81-1633, slip op. at 14 (7th Cir. 16 Feb. 1982). *See also Donaldson* v. *O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (holding that "where, as here, a plaintiff can show he has been unable through diligent, good faith efforts to retain local counsel, attorney's fees under 42 U.S.C. § 1988 are not limited to the prevailing rate in the district where the case is tried.").

The appropriate rate for Winfield, in contrast, is that prevailing in Mississippi. His role in the case fits squarely within the exception to the rule that the district court's community should be used in determining the hourly rate. The justification for Winfield's participation in the case was, in appellees' own words,

> his expertise in and extensive knowledge of local Warren County conditions, particularly the location of black population concentrations in Vicksburg and Warren County, population shifts since the 1970 Census, the location of streets and other boundaries used in the plaintiffs' proposed redistricting plan, the history of discrimination against black people in Warren County, and the current grievances of the black community against the Board of Supervisors." [34]

Winfield thus was hired for his particular expertise, and and his function could not have been duplicated by an attorney from the District of Columbia. The proper hourly rate, therefore, is the normal one in Mississippi.

The district court awarded Winfield $60 per hour, but we vacate this award and remand for a new determination. Intervenors sought to recover District of Columbia rates for all their attorneys, and thus provided little evidence on Mississippi rates. Winfield simply asserted that "[f]or a case of this magnitude and significance, my hourly rate is $75.00 per hour." [35] If this was meant to indicate the rate Winfield normally charges when he performs work for a fee, then he should provide specific supporting evidence, as required by *National Association of Concerned Veterans*.[36] The cases provided by intervenors showing rates awarded for Mississippi services in other litigations are legitimate pieces of evidence, though

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[34] Brief for Appellees at 27.

[35] Affidavit of James E. Winfield at 4, *reprinted in* J.A. at 34.

[36] Slip op. at 9-10.

the weight given them by the district court should depend on whether "they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised."[37] Any further evidence adduced by Winfield in support of his claimed rate, or evidence offered by appellants to support a lower rate, should be evaluated in accordance with *Concerned Veterans*, as of course should the evidence regarding the rates for the other three attorneys.

C. *Adjustments to the Lodestar*

The final point of contention is the district court's decision to adjust the lodestar upward by a factor of 1.5. The court reasoned as follows:

> This case was a contingent one for intervenors' attorneys, who work for a private charitable civil rights legal organization, the Lawyers' Committee for Civil Rights. The Lawyers' Committee has no fee arrangement with its clients and is substantially dependent upon court awards of attorneys' fees to continue its work. Additionally, this case presented issues of first impression to this Court. It is the first one in which a proposed plan to redistrict a county was challenged as racially discriminatory and as an attempt to gerrymander district lines to dilute the black voting strength. Finally, the intervenors' quality of representation was unusually and consistently high.[38]

We vacate this aspect of the award and remand for a new determination of what adjustment, if any, should be made to the lodestar.

In *Copeland* v. *Marshall* this court held that an adjustment to the lodestar may be appropriate to com-

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[37] *Id.* at 9 n.7.

[38] Mem. op. at 4-5, *reprinted in* J.A. at 16-17.

pensate for certain factors such as the contingent nature of success, delay in receipt of payment, and the quality of representation. The decision left open the possibility that other factors may be relevant in adjusting the lodestar up or down, but these three have remained the basic considerations.[39]

Applying this framework to the district court's reasoning in support of the upward adjustment, we first note that the court improperly relied on its view that the case presented issues of first impression. We do not believe such a consideration is appropriate in determining whether to adjust the lodestar fee.[40] If a case was particularly difficult, it probably required a large number of hours of attorney time, a factor which will show up in the lodestar calculation.[41] And if especially talented counsel were necessary to litigate the case, this fact will be reflected in the hourly rate used in setting the lodestar fee. In addition, the complexity and uncertainty of the issues in the case are considerations in determining whether there was a possibility that no fees would be recovered and therefore whether a contingency adjustment

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[39] 641 F.2d at 892-94.

[40] Even were we to find this consideration relevant, we would disagree with the district court that this case presented issues of first impression. That this was the first case in this circuit to deal with *county* redistricting is not dispositive. This circuit has dealt before with cases under the Voting Rights Act involving the legality of a redistricting scheme. *See, e.g., Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge district court), *aff'd mem.*, 444 U.S. 1050 (1980). We perceive no difference between the applicable law on county redistricting and that on redistricting of other governmental jurisdictions. Moreover, many county redistricting cases have been decided elsewhere. Intervenors' lead counsel Parker alone has listed five Mississippi county redistricting cases on which he served as lead counsel for black plaintiffs. Affidavit of Frank R. Parker at 7, *reprinted in* J.A. at 29.

[41] *See Copeland*, 641 F.2d at 890.

is appropriate.[42] Finally, there remains a possibility of upward adjustment based upon the quality of a representation or the nature of the results achieved. Any further consideration of the first impression nature of the issues is therefore unwarranted as it would be duplicative.

The district court properly considered the contingent nature of the representation by attorneys for appellees. Appellants have not asserted the existence of a fee arrangement between appellees and their attorneys, and accordingly it was proper to provide an adjustment for the contingency that no fees would be awarded.[43] An additional factor which the district court could have considered, but did not, was the delay in payment of the fees. Of course, as we cautioned in *Copeland*, "if the 'lodestar' itself is based on *present* hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the harm resulting from delay in payment may be largely reduced or eliminated." [44]

We disagree strongly, however, with the district court's decision to base the adjustment in part on its view that

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[42] *See* note 43 *infra*. *See also Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42, 60-61 (D.C. Cir. 1982) ("It is true that the case is extremely important and very complicated, and that EDF counsel performed with great skill; however, these factors are fully compensated by the amounts credited under the categories of 'hours reasonably expended' and 'reasonably hourly rates.' ").

[43] The court should, however, inquire specifically into the actual probability that intervenors would have lost the case and thus recovered no fees. *See Copeland*, 641 F.2d at 893 (Since "it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful . . . we ask only that the district court judges exercise their discretion as conscientiously as possible, and state their reasons as clearly as possible.")

[44] *Id.* at 893 n.23. *See also Concerned Veterans*, slip op. at 15.

"the intervenors' quality of representation was unusually and consistently high." [45] We have found it all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop. *Copeland* contemplated such adjustments only for rare cases: "A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the 'lodestar.'" [46] As we stated in *Concerned Veterans*: "The Court could not have stated in clearer terms that an adjustment for the quality of representation should not be routinely awarded but only awarded in exceptional cases. An adjustment should not be made out of sympathy for claimant's cause or to mollify counsel because the lodestar figure claimed was reduced." [47]

Of course it remains within the district court's discretion to make this quality determination. But in this case the district court's own opinion demonstrates conclusively that a quality adjustment was not warranted. In the initial part of its opinion discussing the reasonable hourly rates, the court stated:

> Frank Parker, the lead counsel, is an experienced and able specialist in the field of reapportionment and county redistricting. In the instant litigation, he presented his case with efficiency and clarity. His performance was generally of high quality. James Winfield and Richard Kohn, while not specialists in their field, also ably represented their clients. Barbara Phillips, a recent law school graduate, prepared the intervenors' application for attorneys' fees and costs.[48]

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[45] Mem. op. at 5, *reprinted in* J.A. at 17.

[46] 641 F.2d at 893.

[47] Slip op. at 15.

[48] Mem. op. at 2-3, *reprinted in* J.A. at 14-15.

As regards Phillips, it is obvious that the district court found nothing exceptional in her performance. Indeed, it is almost incredible that her performance could have been exceptional, given that her function was simply to prepare the application for attorneys' fees and costs. As regards Winfield and Kohn, the district court found that they "ably represented their clients." Far from representing an unusually high quality of representation, "able representation" is the minimum that every client is entitled to expect from his attorney. And "efficiency and clarity" and performance "generally of high quality," which was how the district court described Parker's performance, is precisely what one would expect from an attorney particularly experienced in this field serving as a party's lead counsel in a complex litigation. Based on these descriptions the district court's determination that attorneys for appellees were entitled to an upward adjustment for the quality of their representation was erroneous as a matter of law.[49]

We hasten to emphasize that in no way do we denigrate the capabilities and performances in this litigation of the attorneys for appellees. But the district court made every effort to ensure that these attorneys were awarded an appropriate market rate for attorneys of their experience and for this type of litigation. We have no doubt that the district court will do the same on remand, if it finds fees are warranted, when it determines the appropriate District of Columbia rates for Parker, Kohn, and Phillips, and the appropriate Mississippi rate for Winfield. But as this court recently held in *Environmental Defense Fund, Inc.* v. *EPA*, no quality adjustment is appropriate when, "while the 'quality of representation'...

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[49] We note also that if the district court felt that, say, one of the four attorneys had performed unusually well, it should have awarded an adjustment only for that attorney's lodestar amount. The special quality of one lawyer's services provides no logical basis for granting all the lawyers a quality adjustment.

was first-rate, the work done clearly was performed at levels of efficiency that were within the usual range of these experienced lawyers' skills." [50] The district court's own description of the level of representation in this case makes clear that the work done was not exceptional, but rather performed at levels one should expect from these lawyers.[51]

## IV. Conclusion

On remand the court should first determine appellees' general entitlement to attorneys' fees in this case. If the court finds that fees are appropriately granted, it should then conduct an evidentiary hearing to determine the reasonable number of hours worked by Winfield, in light of the discussion in this opinion. The court should also determine the prevailing market rate in the District of Columbia for attorneys similar to Parker, Kohn, and Phillips, and in Mississippi for attorneys similar to Winfield. Having thus calculated the lodestar fee, the court should then determine an adjustment to the lodestar, if any is deemed appropriate, based on the contingent nature of this suit and on the delay in receipt of payment, if the hourly rates used in calculating the lodestar are not present hourly rates. The court may not include an upward adjustment for the quality of representation, as we have held that court's own opinion shows that such an adjustment is unwarranted.

*Reversed and remanded.*

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[50] 672 F.2d 42, 64 (D.C. Cir. 1982). *See also id.* at 60-61, *quoted at* note 42 *supra*.

[51] *Copeland* also provides, under the rubric of quality of representation, that the court may adjust the lodestar upward if the attorney has "obtained an exceptional result for the client." 641 F.2d at 894. This means a result substantially better than could reasonably have been expected. The district court properly did not rely on that standard below, as the result obtained here was not exceptional, even though it was an important one which furthered the goals of the Voting Rights Act.

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No. 81-2135

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

**UNIROYAL, INC.,**

*Petitioner,*

v.

**ALTA CHRAPLIWY, *et al.*,**

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Uniroyal, Inc. (hereinafter referred to as "Uniroyal"), submits this supplemental brief pursuant to Rule 22.6 of the Rules of this Court to discuss the significance of this Court's decision in *Hensley* v. *Eckerhart*, 51 U.S.L.W. 4552 (1983), to the issues raised in the pending petition for certiorari in this case.

In *Hensley*, this Court held that under 42 U.S.C. § 1988 a prevailing party may not recover attorneys' fees for time expended in support of unsuccessful claims which are factually or legally distinct from the claims upon which the party prevailed. Contrary to the assertions of Respondents, this Court's analysis in *Hensley* supports each of the arguments propounded by Uniroyal in its petition for certiorari seeking review of the decision of the Seventh Circuit below.

After noting that "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories," the Court held that "these unrelated claims [must] be treated as if they had been raised in separate lawsuits" for the purpose of limiting fee awards to prevailing parties. 51 U.S.L.W. at 4555. If different claims for relief that are based on different legal theories within a single lawsuit must be separated before applying any attorneys' fee paradigm, then, *a fortiori*, claims which are initially brought as separate lawsuits or administrative actions must also be individually scrutinized before attorneys' fees can be awarded to a prevailing party. It follows in accordance with the Court's reaffirmation of the "American Rule" that each such claim must have its own express statutory authorization in order for the district court to award attorneys' fees. As the District Court held below, and Respondents do not deny, none of the separate collateral actions for which fees are sought in this case was brought pursuant to any statute authorizing an award of attorneys' fees to either party.[1] To award fees for time expended in these actions would be inconsistent with the reasoning of *Hensley*.

Significantly, the *Hensley* decision rejected the argument that a less stringent standard should apply in civil rights cases. Additionally, the Court rejected the notion that fees should be awarded for all time spent prosecuting any claim which in any way contributed to the results achieved. 51 U.S.L.W. at 4554. This is precisely the standard which the

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[1] The separate collateral actions include all claims which did not arise under Title VII, i.e., *Chrapliwy* v. *Dunlop*, No. 75-1705 (D.D.C. 1975); *OFCCP* v. *Uniroyal, Inc.*, No. 1977-1; *Uniroyal, Inc.* v. *Marshall*, ___ F. Supp. ___, 20 Fair Empl. Prac. Cas. (BNA) 477 (N.D. Ind. 1977); *Uniroyal, Inc.* v. *Marshall*, 482 F. Supp. 364 (D.D.C. 1979); *Chrapliwy* v. *Marshall*, Case No. 79-1647 (D.D.C. 1979).

Seventh Circuit erroneously applied in reversing the District Court and awarding fees for the collateral actions.[2]

With respect to the hourly rates awarded by the District Court below, the *Hensley* decision also supports Uniroyal's contention that the issue of appropriate billing rates is a matter properly left to the district court's discretion. The Court held:

> We reemphasize that the district court has discretion in determining the amount of the fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

51 U.S.L.W. at 4556.[3]

Here the Seventh Circuit clearly encroached upon the District Court's discretionary domain by making its own independent findings regarding the hourly billing rates allowable for this litigation. This intrusion was unwarranted since the District Court's fee award of over $833,000

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[2] Specifically, the Seventh Circuit held that "Section 706(k) should be interpreted as allowing attorneys' fees to the prevailing plaintiffs for services which contribute to the ultimate termination of Title VII actions." Appendix at A-13.

[3] *See also* the dissenting opinion wherein Justice Brennan stated, "Evaluation of the interrelatedness of several claims within a single lawsuit, and of the legal work done on those claims, is most appropriately a task for the district court that heard and decided the case. . . . Congress having delegated responsibility for setting a 'reasonable' attorney's fee to the court that tried the case, reviewing courts, as a matter of good judicial policy, should not disturb the trial court's solution of the problem of balancing the many factors involved unless the end product falls outside of a rough 'zone of reasonableness,' or unless the explanation articulated is patently inadequate." 51 U.S.L.W. at 4560, n.11.

was well within the range of reasonableness and the District Court articulated an adequate explanation for its selection of local, rather than out of town, billing rates.[4]

Thus, the reasoning of *Hensley* is contrary to the Seventh Circuit's analysis of both issues now raised before this Court. Rather, the *Hensley* decision supports the approach taken by the District Court below in assessing the proper fee award in this case. Therefore, and for the reasons previously articulated, Uniroyal respectfully submits that the Seventh Circuit erred in reviewing the District Court's award and that this Court should grant certiorari in the instant case.

Respectfully submitted,

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[4] Indeed, as Uniroyal has stated in a prior supplemental brief, the District Court's choice was consistent with the analysis adopted by other courts faced with the same balancing problem. *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), *petition for cert. pending* (No. 82-915).

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether Section 706(k) of Title VII of the Civil Rights Act of 1964 authorizes the award of attorney's fees to prevailing plaintiffs for successful litigation activities undertaken pursuant to plaintiffs' responsibilities as representatives of the class to obtain relief in the Title VII case where the award is sought.

2. Whether, under the circumstances of this case, the court of appeals was required to remand the case to the district court for further findings of the reasonableness of counsel's normal billing rates.

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IN THE

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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### STATEMENT

On November 28, 1972, Alta Chrapliwy and twenty-five other named plaintiffs [1] filed a class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, on behalf of all female workers employed at Uniroyal's plastic products plant in Mishawaka, Indiana. Defendant Uniroyal immediately retained a talented and highly-paid defense team of lawyers from New York and Chicago and from South Bend, Indiana,

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[1] In addition to plaintiff Chrapliwy, the named plaintiffs are Joan Brugh, Valerie C. Cruff, Margie L. Calmer, Ruby Creasy, Katherine Van Lake Blasko, Genevieve Browning, Genevieve Stachowicz, Harriet Watkins, Wanda Fry, Naomi D. Werner, Mable Richey, Lynda Brown, Betty Rader, Betty C. Fye, Lora M. Riggle, Mary Jacobs, Anna Ray, Derna J. Sowell, Pearl Carver, Margarete G. Bloss, Pansy V. Ellis, Betty J. Covington, Ivajean R. Strock, Dorothy M. Smith, and Betty Young.

where the district court sat. The company fought tenaciously over the next seven years, and ultimately succumbed and settled this litigation in 1979 only when plaintiffs' efforts to have it debarred from its lucrative federal contracts proved successful.[2]

As the district court stated, "No ground was surrendered without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement." *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 460 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982). (Appendix at B-36, *see also* App. B-17)[3] The record below confirms the district court's observation. Over the course of this extended litigation the district court issued ten published decisions.[4] Related litigation in the Northern District

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[2] The term "debarment" refers to cancellation of existing federal contracts and the declaration of ineligibility to obtain future federal contracts pursuant to Executive Order 11246 and related federal regulations, which prohibit employment discrimination based on race, color, religion, sex, or national origin by those who contract with the federal government, and which impose affirmative obligations on federal contractors to ensure that their employees are not subjected to discrimination. The Secretary of Labor and the Director of the Office of Federal Contract Compliance Programs are responsible for the issuance and enforcement of regulations under the Order. *See generally*, 41 C.F.R. Ch. 60 (1981).

[3] The decisions of the district court in Chrapliwy v. Uniroyal, Inc., 509 F.Supp. 442 (N.D. Inc. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), and the court of appeals in Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), will be cited as they appear in the Appendices to the Petition for Writ of Certiorari.

[4] The reported decisions in this case, each of which is styled Chrapliwy v. Uniroyal, Inc., can be found at 5 FEP Cases 806 (N.D. Ind. 1973); 5 FEP Cases 808 (N.D. Ind. 1973); 5 FEP Cases 949 (N.D. Ind. 1973); 6 FEP Cases 98 (N.D. Ind. 1973); 7 FEP Cases 343 (N.D. Ind. 1974); 12 FEP Cases 1657 (N.D. Ind. 1976); 12 FEP Cases 1661 (N.D. Ind. 1976); 71 F.R.D. 461 (N.D. Ind. 1976); 458 F.Supp. 252 (N.D. Ind. 1977); and 15 FEP Cases 822 (N.D. Ind. 1977).

of Indiana, the Seventh Circuit, the United States District Court and Court of Appeals for the District of Columbia, and the Department of Labor resulted in three additional published decisions.[5]

The settlement agreement required Uniroyal to pay the 526 members of the plaintiff class cash and pension benefits totalling $9,318,000, to reinstate 296 terminated class members to active employment with full seniority, and to change the employment system at the Mishawaka plant to improve job opportunities for all female workers. (App. B-1) To obtain that relief plaintiffs' attorneys worked a total of 11,743 hours.

Settlement of the merits of the Title VII case left only the award of reasonable attorney's fees pursuant to Section 706(k), 42 U.S.C. § 2000e-5(k).[6] This led to a new round of litigation in which both sides conducted discovery and made extensive factual and legal arguments to the district court. In March 1981, the district court awarded plaintiffs' counsel $583,679 to compensate for the time spent in this case, and an additional $250,000 in recognition of the quality of counsel's representation, the risks inherent in undertaking the representation on a contingent basis, and the results obtained. That decision was appealed by both parties, giving rise to the decision presented for review.

The district court's decision reflected two rulings on questions of law that were reversed on appeal. First, although the district court had found that plaintiffs'

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[5] Uniroyal, Inc. v. Marshall, 579 F.2d 1060 (7th Cir. 1978); Uniroyal, Inc. v. Marshall, 482 F.Supp. 364 (D.D.C. 1979); OFCCP v. Uniroyal, Inc., 20 FEP Cases 419 (U.S. Dept. of Labor 1979).

[6] Section 706(k), 42 U.S.C. § 2000e-5(k), provides in pertinent part:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

actions in seeking Uniroyal's debarment "were not unreasonable or undesirable," (App. B-20) and that these debarment proceedings had forced Uniroyal to settle the Title VII case (App. B-17, B-35-36; *see also* App. A-5, A-11-A-12)[7] the court nonetheless concluded that the language of Section 706(k) and this Court's decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), "circumscribe the district court's ability to award payment for these hours." (App. B-20) Additionally, though the district court had found that the normal hourly billing rates of prevailing plaintiffs' counsel were reasonable and comparable to defense counsel's rates (App. B-27; *see also* A-6, A-13-15) it ruled that plaintiffs' attorneys' rates must be reduced to "balance" them against lower local rates. (App. B-28) The district court then cut the normal hourly rates of all plaintiffs' attorneys, local as well as out-of-town, and based its fee award on the reduced rates. (App. B-33)

The United States Court of Appeals for the Seventh Circuit reversed on both issues. The Seventh Circuit held that the district court erred as a matter of law in concluding that Section 706(k) or this Court's decision in *Carey* limited its ability to award attorney's fees for plaintiffs' efforts to obtain Uniroyal's debarment as a federal contractor, which both the district court and court of appeals found to have been the decisive factor in forcing Uniroyal to settle the Title VII case. The court of appeals also held that the district court erred as a matter

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[7] The district court also recognized that plaintiffs' persistent efforts had prompted responsible agencies of the federal government to establish mechanisms for the proper enforcement of Executive Order 11246 in future cases:

> "The court is aware that in this case the government agencies responsible for enforcing the Executive Order were slow in performing their statutory function. While they may perform more satisfactorily in the future, that is arguably a result of this litigation. As a product of the plaintiffs' determined prodding, a new OFCCP staff has been established to enforce Executive Order 11246 . . . ." (App. B-19)

of law in determining that it was required to balance the rates customarily charged by plaintiffs' counsel against rates charged by members of the local bar in the community where the district court sits in determining the "reasonable" attorney's fee under Section 706(k). The court thus concluded that the prevailing Title VII plaintiffs were entitled to an award of fees at rates corresponding to counsel's customary billing rates, and it remanded the case to the district court with instructions to award fees on that basis.

## SUMMARY OF ARGUMENT

The decision of the court of appeals is correct and does not merit this Court's review. Petitioner points to no real conflict among the courts of appeal on the legal issues decided by the Seventh Circuit. Moreover, the issues presented for this Court's consideration have little significance beyond this case. The decision below rests on a unique set of facts not likely to recur, and it properly recognizes broad discretion in the district courts to scrutinize attorney's fee awards carefully in future cases. Certiorari therefore should be denied, and this ten year litigation should be allowed to draw to a close.

## ARGUMENT

### A. The Court of Appeals Correctly Reversed the District Court's Decision That It Was Prohibited as a Matter Of Law from Compensating Plaintiffs' Attorneys for Their Work in Forcing Settlement of the Title VII Case by Causing Uniroyal's Debarment as a Federal Contractor.

Although recognizing that plaintiffs' efforts to have Uniroyal debarred as a federal contractor forced the company to settle this Title VII case, the district court denied plaintiffs any compensation whatsoever for 2,348 hours of work leading to that result, reasoning that Section 706(k) prohibits compensation for all work that is not expressly "mandated" by Title VII or its required procedures. (App. B-17-18) The court of appeals reversed, holding that Title VII does not preclude an award of fees for plaintiffs' work under the circumstances of this case. This decision is clearly correct and does not warrant review.

Uniroyal attacks the court of appeals' decision principally by attempting to reargue factual assertions that were rejected by the Seventh Circuit after its careful review of the district court's findings. The company seeks to characterize the proceedings leading to Uniroyal's debarment and the successful settlement of the Title VII case as "independent non-Title VII proceedings" and "collateral actions" resulting from plaintiffs' abandonment of the Title VII case. (Petn. at 10-11) These characterizations are patently false, as the Seventh Circuit found.

In obtaining Uniroyal's debarment, plaintiffs asserted Title VII rights on behalf of the plaintiff class and sought Title VII relief. As the Seventh Circuit explained:

> The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were

> designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action. (App. A-12)

(*See also* App. A-5—The debarment effort "involved issues that were identical to the basic issues in the Title VII action itself.") The court of appeals further noted that plaintiffs' resort to the debarment remedy was a necessary and appropriate response to the delays in the Title VII litigation resulting from the death of the district judge to whom the case was assigned and Uniroyal's obvious intention to take full advantage of that delay to postpone the relief to which the Title VII class was entitled.[8]

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[8] When plaintiffs initiated actions to compel the federal government to enforce Executive Order 11246 so as to force settlement of the Title VII action, the litigation in the district court had been underway for more than two years and was languishing. Plaintiffs had won a partial summary judgment establishing Uniroyal's basic liability for violations of Title VII and had completed discovery and filed a motion for summary judgment on the remaining liability issues, which was pending when the district judge died. (App. B-3) When plaintiffs' counsel requested the assignment of a new judge so the case could be expedited in accordance with the mandate of Title VII, *see* 42 U.S.C. § 2000e-5(f)(5), they were advised by the Chief Judge that docket congestion and the judicial shortage might cause an indefinite delay.

Uniroyal took full advantage of this opportunity, failing to file a response to plaintiffs' summary judgment motion for two years. (App. B-3) Moreover, as the district court later commented, "Although Uniroyal's violation of Title VII had been judicially determined, Uniroyal did nothing in the interim to provide relief for members of the plaintiffs' class." (App. B-4)

Uniroyal's delay tactics persisted throughout this litigation. In July of 1973, Judge Beamer criticized Uniroyal's "bad faith" in delaying its responses to plaintiffs' discovery requests, which caused prejudice to the plaintiffs. *See* Chrapliwy v. Uniroyal, Inc.,

> In October of 1974, Judge Beamer, who had been handling the case, died. His death and the resulting vacancy on the district court delayed further proceedings.
>
> Time was passing, and there was further delay. It appeared that defendant was taking advantage of the situation, and doing nothing to provide relief for members of the plaintiff class. Beginning in 1975, plaintiffs sought to obviate further delay in the Title VII action by attempting to persuade the federal government to notice defendant's discriminating practices which were the subject of the Title VII action and to take action against defendant based on such discrimination. (App. A-4) (citations omitted)

Finally, both the trial court and the appellate court found that plaintiffs' pursuit of the debarment remedy was undertaken pursuant to their responsibilities as class representatives to "initiat[e] whatever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal" [9] (App. A-5 quoting *Chrapliwy* v. *Uniroyal*,

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6 FEP Cases 98, 100 (N.D. Ind. 1973). The court expressly rejected the company's "weak explanation for delay" in responding to plaintiffs' discovery, and characterized the company's objections to plaintiffs' interrogatories as "groundless." *Id.* at 100. It also criticized "the inexcusable delays occasioned by defendant's actions," *id.* at 101, and found that Uniroyal's actions evidenced a "desire to create delay." *Id.* at 100. Consistent with its litigation strategy throughout, the company filed a motion to "alter" the court's July, 1973 order, which was denied. Chrapliwy v. Uniroyal, Inc., 7 FEP Cases 343, 344 (N.D. Ind. 1974).

[9] The district court held:

> By writing to the Federal agencies to inform them of discriminatory practices in violation of Executive Order No. 11246, and by seeking an order to compel the appropriate agencies to bring Uniroyal's alleged discriminatory employment practices into compliance with Executive Order No. 11246, *the plaintiffs' attorneys have attempted diligently to pursue*

*Inc.*, 12 FEP Cases 1661, 1663 (N.D. Ind. 1976), and that plaintiffs' pursuit of the debarment remedy "directly contributed" to the successful settlement of the Title VII case in which the fees here at issue were sought. (App. A-5)

> In October of 1979, less than one week before the defendant was to lose a large federal contract as a result of the government's investigations of a violation of Executive Order 11246, the parties settled the Title VII action. The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near. (App. A-5) (citations omitted)

Under these unique circumstances, the award of attorney's fees for these decisive litigation activities was clearly warranted.

Uniroyal contends that an award of fees for plaintiffs' successful work to force a settlement of the Title VII case through pursuit of the debarment remedy is precluded by this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). This is plainly incorrect, and does not present an issue worthy of this Court's consideration.

The *Alyeska* decision has virtually no bearing on this case. *Alyeska* held that the award of attorney's fees to the prevailing party is normally not appropriate in the absence of explicit statutory authority. In this case

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*a second available means of redress for their clients.* Chrapliwy v. Uniroyal, Inc., 12 FEP Cases 1661, 1662 (N.D. Ind. 1976).

* * * *

*As representatives of the class, they were charged with the responsibility of initiating whatever action would be necessary to vindicate the rights of the entire class* against the alleged discriminatory employment practices of Uniroyal. *Id.* at 1663.

Section 706(k) of Title VII authorizes the award of reasonable attorney's fees, and this Court has emphasized that the policies of Title VII require that the prevailing Title VII plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417-18 (1978), quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

*Carey* is likewise no bar to the award of attorney's fees for the plaintiffs' pursuit of the debarment remedy, which proved to be determinative of the Title VII case in which the fees were awarded. The Seventh Circuit's decision analyzes the significant factual differences distinguishing this case from *Carey*, and thus indicating that *Carey* should not be read to preclude an award of fees here. (App. A-10-11) Uniroyal makes no attempt to challenge that analysis.

Equally important, to the extent that it applies here, *Carey* favors the award of fees for these determinative litigation efforts. As the Seventh Circuit stated:

> If *Carey* has any application to the particular question before us, it is in indicating that the statute should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court. The Supreme Court expressly recognized that a liberal view toward fees would further Congress' goal of "[making] it easier for a plaintiff of limited means to bring a meritorious suit." 447 U.S. at 63, quoting *Christiansburg Garment Co., supra*, 434 U.S. at 420. (App. A-12)

Ignoring the district court's ruling that plaintiffs' pursuit of the debarment remedy was undertaken pursuant to their obligation as Title VII class representatives to further the interests of the class,[10] Uniroyal contends

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[10] Pursuit of this avenue as a means for obtaining relief for the Title VII class was likewise required by the Code of Professional

that these activities cannot be compensated because they were not "mandated" by the Act. (Petn. at 9) In support of that claim, Uniroyal mistakenly argues that *Carey* establishes the outer limits of the district court's authority to award fees to prevailing Title VII plaintiffs under Section 706(k) and indicates that fees can "only" be awarded for work performed in state proceedings required to be invoked by Title VII. (Petn. at 9)

*Carey* neither requires nor countenances any such narrow interpretation of Section 706(k). To the contrary, *Carey* and the Court's other decisions interpreting Section 706(k) and related attorney's fee statutes evidence a clear intent to apply those provisions liberally in a manner that will encourage "private attorney[s] general" to step forward and vigorously enforce this important body of law. *See, e.g., Carey*, 447 U.S. at 63; *Christiansburg Garment Co.*, 434 U.S. at 416-17; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. at 401-402. As the Court has recognized, the purpose of such fee provisions is to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Christiansburg Garment Co.*, 434 U.S. at 420; *see also Carey*, 447 U.S. at 63.

In holding that attorney's fees earned in state administrative and judicial proceedings prior to federal suit were earned in "an action or proceeding" under Title VII, the Court in *Carey* did not purport to limit the permissible award of attorney's fees under Section 706(k) to hours expended in the pursuit of remedies "mandated" by Title VII. There is no suggestion in *Carey* that this Court was attempting to define the outer limits of the district courts' authority to award attorney's fees to

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Responsibility of the American Bar Association. Disciplinary Rule 7-101, (A)(1) of the Code provides as follows:

> *Representing a Client Zealously*
>
> A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law . . . .

prevailing Title VII plaintiffs, as Uniroyal presumes. Instead, *Carey* is simply illustrative of situations where the liberal policies of Title VII dictate that fees may be awarded. As the Court stated in *Carey*:

> *It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers this goal,* while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim. 447 U.S. at 63. (Emphasis added).

Indeed, the Court in *Carey* explicitly rejected an acknowledgedly plausible but more limited interpretation of Section 706(k) as contrary to the statutory policies, *see* 447 U.S. at 62, and it authorized an award of fees for litigation activities not "mandated" by Title VII, which requires only that plaintiffs invoke state remedies and wait sixty days before initiating a federal action, not that they exhaust their state remedies, as did the prevailing plaintiff in *Carey*.[11]

Uniroyal's restrictive interpretation of Section 706(k) is exactly the kind of rigid, mechanical analysis that this Court has repeatedly rejected. *See, e.g., Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 419. ("[T]he per-

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[11] As the Court recognized, Title VII does not require that a plaintiff *exhaust* state remedies before invoking the jurisdiction of the EEOC or the federal courts. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65, 66 n.6 (1980). The statute only requires that a complaint *invoke* state agency proceedings for a period of sixty days, and it does not require resort to any state judicial proceedings at all. In *Carey*, however, the plaintiff pursued both state administrative remedies and state court proceedings for a period of three years, and her counsel spent 51 of the total 82 hours devoted to the case in these proceedings. Thus, if Section 706(k) were construed to limit attorney fees to proceedings "mandated" by Title VII, the plaintiff in *Carey* would only be entitled to fees for the first 60 days in the state agency proceedings, not to her extended pursuit of the entire course of state agency action and judicial review.

missive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction."); *Carey*, 447 U.S. at 62 ("We find nothing ing the statute . . . to suggest that Congress intended to draw this particular line.")

The policies of Title VII are promoted by the award of fees for plaintiffs' decisive debarment litigation activity, which enabled the Title VII plaintiffs to obtain relief more expeditiously and economically in the unique circumstances of this case. Congress incorporated class action proceedings into Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971). As the Seventh Circuit recognized, all the work performed by plaintiffs and their attorneys following the certification of the Title VII class in this case, including their work leading to Uniroyal's debarment and the settlement of the Title VII case, was done in furtherance of their obligation to protect the interests of the Title VII plaintiff class fairly and adequately, and thus was part of the action and proceedings under Title VII within the meaning of Section 706(k). (App. A-5; A-12)[12] Similarly, Congress intended that Title VII be applied to enable plaintiffs to obtain prompt relief after defendant's liability is established. Thus, conciliation of violations is strongly favored, *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Carson* v. *American Brands, Inc.*, 450 U.S.

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[12] Uniroyal complains that it was not a party in some of the debarment litigation. This misses the point, however, since the court of appeals found that all of plaintiffs' activities to pursue the company's debarment were undertaken pursuant to their obligations as representatives of the VII Title class and in pursuit of their Title VII rights. (App. A-12) Under the circumstances of this case, the court of appeals' characterization of Uniroyal's contention as "irrelevant" was entirely correct. (App. A-13, n.15) The principle that prevailing plaintiffs should be compensated for reasonable and successful efforts to obtain Title VII relief is not limited to formal face-to-face confrontations between the Title VII plaintiff and defendant.

79 (1981), and the Act provides that Title VII actions are to be expedited "in every way." 42 U.S.C. § 2000e-5(f)(5). Here, the award of fees for the debarment litigation, which forced a just settlement of the Title VII case without a lengthy trial and appeal, serves all of those policies.

Finally, the Seventh Circuit's decision in this case does not represent "an entirely new standard" for Title VII fee awards (Petn. at 7), nor does it open the floodgates of needless litigation for the purpose of fee generation, as Uniroyal suggests. (Petn. at 10) To the contrary, the Seventh Circuit's decision recognizes the district court's responsibility in considering fee awards to ascertain "the number of hours reasonably expended to obtain relief in the action." (App. A-9, *citing Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), and *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981). The court of appeals also expressly acknowledges that a district court need not award fees for litigation activities if it determines that they were not reasonable. (App. A-8; A-10, n.12) Thus, the decision below is not a directive to district courts automatically to award fees for any and all activities that lead to the termination of a Title VII case, as Uniroyal contends. (Petn. at 10) It is instead a ruling that Section 706(k) authorizes, subject to the discretion of the district court, the award of fees for reasonable activities of the kind here at issue.

The Seventh Circuit's ruling is clearly correct. Petitioner points to no conflict among the circuits on the principle of law here at issue, or to any error in applying that principle in this case. Review by this Court is therefore not warranted.

**B. The Court of Appeals Correctly Ruled That Prevailing Plaintiffs' Attorney's Fees Are To Be Based on Counsel's Normal Hourly Billing Rates. No Remand On That Issue Was Required in View of the Extensive Findings Made By the District Court and Relied on By the Court of Appeals.**

Uniroyal contends that the court of appeals "rejected the District Court's findings of fact and substituted its own findings" in holding that plaintiffs' attorneys' normal hourly billing rates should be used in computing the fee award. (Petn. at 14) The company further claims that plaintiffs' attorneys' normal hourly billing rates were not shown by sufficient evidence. These complaints are unfounded.

Uniroyal's belated challenge to the hourly rates at which plaintiffs' attorney's fees are to be computed presents a question whether the court of appeals was required to remand this issue to the district court rather than resolve the question itself on the basis of the substantial evidence of record. This is not an issue warranting this Court's attention. The Seventh Circuit was plainly correct in relying on the district court's extensive findings of fact to resolve the issue. *Cf. Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 332-33 (1974).

Uniroyal's basic argument misinterprets the Seventh Circuit's ruling and seeks now to raise factual issues never presented to the district court, which, as the court of appeals noted, found that plaintiffs' attorneys' normal hourly billing rates were reasonable. (App. A-13) The normal billing rates of plaintiffs' counsel were shown by evidence of record, which was undisputed by defendant Uniroyal in the district court. Similarly, the company did not complain in the district court that plaintiffs were required to offer additional proof that their attorneys' normal billing rates had actually been charged to and collected from other clients, and it did not seek to make that an issue at that time. The sufficiency of

the evidence regarding the rates charged by counsel was unquestioned by or before the district court, and its finding of the reasonableness of these rates also was supported by the evidence, including evidence that Uniroyal itself hired comparably-priced counsel and relied on them extensively throughout this litigation. (*See* App. A-6; A-14; B-26; B-28)

Plaintiffs' verified Application for Attorney's Fees, filed May 16, 1980, gave the current billing rates of each of plaintiffs' attorneys and described each attorney's experience and qualifications. Thereafter, each party served interrogatories on the other, calling for each attorney's hourly billing rates. Uniroyal's interrogatories to plaintiffs requested each of their attorneys' "hourly billing rates for each type of client served or case in which work was performed" from 1972 through 1980. In response, plaintiffs' sworn answers showed that the current normal billing rates of the various attorneys who worked on prevailing plaintiffs' behalf ranged from $200 to $50 per hour. Those facts having been established, Uniroyal did not seek any additional discovery or substantiation by plaintiffs, nor did it challenge the accuracy or sufficiency of the evidence of plaintiffs' attorneys' normal billing rates before the district court.

Uniroyal now belatedly maintains that the district court was required to develop a factual record establishing that plaintiffs' lead counsel, Thomas R. Ewald, actually charged his rate of $175 per hour to other clients. (Petn. at 15) That issue was not raised in the district court and was invented for the first time on appeal. In any case, it is a non-issue. Plaintiffs' answers to Uniroyal's interrogatories implicitly indicate that the rates given are counsel's actual rates. Furthermore, it should be noted that the published decisions of the United States District Court for the Northern District of Indiana and of the Seventh Circuit demonstrate the extensive experience of plaintiffs' lead counsel in other litigation in the very court in which the fee award was sought.

*See City of Mishawaka, Indiana* v. *American Electric Power Co., Inc.*, 465 F.Supp. 1320 (N.D. Ind. 1979), *aff'd in part and vacated in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *City of Mishawaka, Indiana, et al.* v. *Indiana & Michigan Electrict Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). Thus, the hourly rate sought by plaintiffs' lead counsel was not an "out of town" rate, but rather the "local" rate this attorney has charged in other cases before the same district court, just as were the comparable rates Uniroyal paid its defense counsel from New York, Washington, and Chicago. (*See* App. A-13; B-26)

The district court's view that plaintiffs' attorneys' normal hourly billing rates were reasonable was fully supported by the evidence. Both sides litigated this complex Title VII case primarily through specialized attorneys from New York, Chicago, and Washington, D.C. rather than through local counsel from the South Bend area. The district court found that both sides of this litigation "engaged similarly skilled and expensive counsel to represent [their] interests in this suit." (App. B-26) As that court noted,

> [Uniroyal employed] four major, nationally recognized, law firms, and forty-five attorneys in its spirited defense, for a total of 10,963 hours billed through July 22, 1980. Uniroyal had its own $175 and $200 per hour attorneys, as well as $75 and $100 per hour attorneys, according to the 1980 billing rates. Presumably, these fees were received on a regular basis, without risk of nonpayment. *Id.* (footnote omitted.)[13]

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[13] Of Uniroyal's 45 defense counsel, 37 were from New York, Chicago or Washington. These attorneys worked more than 80% of the hours devoted to the defense of the case, and they collected more than 80% of the fees spent by Uniroyal. *See* Joint Appendix filed in the United States Court of Appeals for the Seventh Circuit at 571. In all, the company's defense counsel were paid the equivalent of $1,309,591.60 at their current billing rates.

As the district court also found,

> The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. (App. B-27)

Finally, the court found that the number of hours devoted to the case by plaintiffs' and defendant Uniroyal's attorneys were approximately the same—11,743 hours for plaintiffs and 10,963 for Uniroyal. (*See* App. B-26 and B-33)

Uniroyal mistakenly contends that the Seventh Circuit substituted its own factual findings for those of the district court. To the contrary, after correcting the district court's erroneous conclusion of law that Title VII required it to "balance" the normal billing rates of plaintiffs' counsel against those charged by local attorneys in the community, (*see* App. A-14) the court of appeals relied on the extensive findings and discussion of the district court to determine that the normal hourly rates of plaintiffs' counsel were reasonable. As the court of appeals stated:

> In our case, the district court did not question the reasonableness of the hourly rates requested by the plaintiffs. The court recognized that the defendant availed itself of counsel charging rates comparable to the rates requested by the plaintiffs. The court did not indicate skepticism over the need for out of town counsel. In fact, the court recognized that Congress intended to encourage plaintiffs to employ counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendant would most likely assert. (App. A-14-15) (footnotes omitted)

Although recognizing considerations that might justify rejection of an out-of-town counsel's rate as the reason-

able rate for the purpose of Section 706(k), (see App. A-14-16) the Seventh Circuit determined that there was "no suggestion that the district court would have answered either of these questions adversely to plaintiffs." (App. A-16)[14] Accordingly, the Seventh Circuit chose to rely on the findings below in establishing the reasonable hourly rate for plaintiffs' counsel rather than prolong this ten year litigation even further by requiring additional consideration of an issue whose outcome had been determined.

Nothing in this Court's recent decision in *Pullman-Standard Co.* v. *Swint*, 50 U.S.L.W. 4425 (S.Ct. April 27, 1982), suggests that the court of appeals erred. Unlike *Swint*, in this case the Seventh Circuit did not reverse the district court's findings of fact and make its own contrary findings. This case, therefore, does not present a violation of Rule 52 of the Federal Rules of Federal Procedure, as did *Swint*.

Moreover, the Court recognized in *Swint* that the normal rule favoring remand for further factual find-

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[14] The Seventh Circuit's judgment on this point is unassailable. As noted previously, the district court had found that both sides in this litigation retained and extensively relied on "similarly skilled and expensive counsel" (App. B-26) and that the calibre of counsel was "equally matched." (App. B-27) The district court additionally had recognized that "[i]t would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys" (App. B-27-28) and noted that "[i]f Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting petitioners to the local billing rate." (App. B-28) Finally, the district court acknowledged that any such litigation would not be consonant with the "national" nature of complex litigation of this kind:

> "The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale." (App. B-28)

ings does not apply where the record permits only one resolution of the issue. *See* 50 U.S.L.W. at 4430, *citing Kelley* v. *Southern Pacific Co.*, 419 U.S. at 331-32. This is just such a case, since all the appellate court had to do in this instance was to apply district court's findings of fact after correcting the erroneous legal conclusion that had prevented the district court from applying those findings itself.[15]

In summary, the court of appeals was plainly correct in determining that the record was adequate to enable it to establish the appropriate rates for the award of fees to counsel for the prevailing Title VII plaintiffs and that the district court would have resolved the question the same way had it not mistakenly concluded that applicable legal standards required some other approach. In any event, this fact-specific issue does not warrant this Court's plenary consideration.[16]

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[15] Uniroyal contends that the court of appeals "totally ignored local billing rates and made its own independent findings of fact that the requested out-of-town rate should be allowed." (Petn. at 16) This is erroneous, since both the trial court and the appellate court put great weight on the fact that the "local rates" for Uniroyal's out-of-town counsel were similar to those of plaintiffs' counsel. (*See* App. B-26; B-28; A-6; A-14)

[16] Uniroyal invites the Court to take this case in order to eliminate allegedly inconsistent attorney's fee rulings emanating from the district courts. (Petn. at 18) The short answer to this plea is that the question presented by petitioner does not afford an appropriate vehicle for such an effort. Equally important, however, there is no indication that such broad guidance is necessary. Examination of the various appellate decisions establishing the basic approach for ruling on fee award requests cited by the Seventh Circuit (*see* App. A-5, n.5) and the more recent decisions cited in Uniroyal's Petition reveals a general consensus as to the basic parameters of the district court's inquiry. The decision in this case is entirely consistent with this basic approach. In view of the discretionary nature of the fee award rulings and the highly fact-specific context in which they are to be made, it is inevitable that some district court decisions may appear to be inconsistent. How-

## CONCLUSION

For the reasons set forth herein, Uniroyal's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied, and this ten-year litigation be allowed to draw to a close.

Respectfully submitted,

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ever, there is no suggestion that the appellate courts are not dealing with any such disparities effectively and in a consistent manner, or that this Court's endorsement of the general standards developing in the courts of appeals is required.

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No. 81-2135

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1981

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UNIROYAL, INC.,
*Petitioner,*

v.

ALTA CHRAPLIWY, *et al.*,
*Respondents.*

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Uniroyal's Supplemental Brief urges the Court to grant certiorari to review *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. filed*, No. 81-2135, and establish a rigid rule requiring that the normal billing rates of prevailing Title VII plaintiffs' counsel—even if found to be reasonable—should be disregarded and limited in every instance to the hourly rates charged by members of the local bar in the community in which the action was filed. In support of this position Uniroyal seeks to create a conflict between the Seventh Circuit's decision in this case and the decision of the United States Court of Appeals for the District of Columbia in *Donnell* v. *United States*, No. 81-1471 (D.C. Cir. June 25, 1982),[1] by misrepresenting the holdings of both.

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[1] The decision in Donnell v. United States, No. 81-1471 (D.C. Cir., June 25, 1982), will be cited as it appears in Appendix E to

There is no conflict between these two decisions, as the D. C. Circuit explicitly recognized in *Donnell*. (E-19-20) Indeed, an examination of the *Donnell* decision clearly indicates that the D. C. Circuit would have decided *Chrapliwy* in the same manner as did the Seventh Circuit, and confirms that *Chrapliwy* does not establish the rigid or pervasive standard that Uniroyal claims.

In the present case both plaintiffs and defendants were represented primarily by attorneys from outside South Bend, Indiana, where the case was filed.[2] Prevailing plaintiffs' attorneys proved their normal hourly rates for litigation at South Bend and elsewhere. Their rates were undisputed by the defendant, and the district court found them to be both reasonable and consistent with the hourly rates that Uniroyal had paid its own attorneys in its unsuccessful defense. (App. A-6; A-13) Despite those findings, however, the trial court held that Title VII required it to "balance" plaintiffs' attorneys' rates against South Bend rates and, without further explanation, cut plaintiffs' rates to below South Bend levels. (A-14) The Seventh Circuit correctly reversed.

Uniroyal now falsely charges that the Seventh Circuit "held that when any doubt exists concerning which legal community should be considered in setting 'the fee customarily charged in the locality for similar legal services' preference should be given to the locality where counsel normally practices." Uniroyal's Supplemental Brief at 3. Nothing in the *Chrapliwy* opinion supports that characterization. To the contrary, the Seventh Circuit held that

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petitioner Uniroyal's Supplemental Brief in Support Of Petition For Writ of Certiorari. The *Chrapliwy* decision presented for review and the district court's opinion in that case will be cited as they appear in Appendix A and B of Uniroyal's original Petition.

[2] Plaintiffs' primary counsel were from Washington, D. C. and New York, and defendants were primarily represented by counsel from Washington, New York and Chicago. Both parties have been represented in the court of appeals and before this Court by counsel from outside South Bend.

the district court should examine a number of factors, including the fees charged by members of the local bar, in determining the "reasonable" rate to be awarded the prevailing Title VII plaintiffs. It additionally found that the record in this case supported the district court's determination that the normal hourly rates of the prevailing plaintiffs' attorneys were reasonable, and that the district court erred in restricting the award to lower rates in this case. As the court stated,

> . . . "The fee customarily charged in the locality" remains one of a number of factors to be considered as guides, and nothing in *Waters* or the Disciplinary Rule makes that factor an overriding limitation.
>
> Although the district court seems to have disclaimed limiting counsel to South Bend rates, it appears that that in fact happened, without any suggestion that the choice of counsel was improvident or counsel's billing rates were out of line with those charged by available counsel of similar expertise, otherwise similarly situated. We conclude there was error. (A-17)

Contrary to Uniroyal's contention, the *Chrapliwy* decision is not "squarely in conflict" with the D. C. Circuit's decision in *Donnell*, Uniroyal's Supplemental Brief at 4, and nothing indicates that the D. C. Circuit would have decided *Chrapliwy* differently.[3] The rule announced in *Donnell* "that the relevant community is the one in which the district court sits," (E-19) is not to be applied rigidly, as Uniroyal urges. Indeed, *Donnell* referred to

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[3] In *Donnell*, three of the four attorneys whose fees were at issue were salaried employees of the Lawyers' Committee for Civil Rights Under Law and presumably had no normal hourly billing rate that they charged their clients. In *Chrapliwy*, by contrast, counsel for plaintiffs and defendants alike were private counsel, and the normal hourly rates of the prevailing Title VII plaintiffs' attorneys were comparable to rates charged by defendant's counsel in this very litigation. This factor, which was not considered in *Donnell*, was of central importance in *Chrapliwy*.

other situations in which the general rule it announced should not be followed, and expressly concluded that its decision does not conflict with the Seventh Circuit's decision in *Chrapliwy*. (E-19-20) Nor did the *Donnell* court suggest that the normal billing rates of prevailing parties' out of town counsel are to be ignored, especially where, as here, their opponent is represented by out-of-town counsel charging comparable, or higher, rates. Indeed, the emphasis in *Donnell* was on "the prevailing market rate within the jurisdiction." (E-19) Applying that principle in *Chrapliwy* would not alter the result, for in *Chrapliwy* the prevailing market rate for the very litigation at issue was the rate charged by petitioner Uniroyal's own counsel. The district court not only found the rates of plaintiffs' attorneys to be reasonable, it found them comparable to the rates charged by defense counsel in the same case. (B-27; A-6; A-13-15).[4]

Uniroyal challenges the *Donnell court's* distinction of *Chrapliwy*, maintaining that the trial court in *Chrapliwy* made no finding that competent lead counsel were not available in the district where the action was filed. Uniroyal's Supplemental Brief at 3, n.3. However, it is quite clear that both lower courts in this case recognized the importance of plaintiffs' retention of specialized counsel, as evidenced in part by the fact that Uniroyal itself retained major out-of-town counsel to conduct its defense. (B-28-30; A-15-17). Plaintiffs' choice of counsel, which both lower courts found to be reasonable, should be honored. Indeed, a rule requiring courts to award less than prevailing plaintiffs' attorneys' reasonable normal hourly billing rates would defeat the statutory purposes

[4] The Eighth Circuit's decision in *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305 (8th Cir. 1981), on which Uniroyal also relies, is likewise consistent with the Seventh Circuit's decision in this case and contrary to the company's position. In *Jorstad* the district court awarded prevailing plaintiffs' attorneys' fees based on a lodestar figure that doubled their normal hourly billing rates. The court of appeals reversed, reducing the award to plaintiffs' attorneys' normal hourly rates. 643 F.2d at 1313.

of the Act, especially in cases where, as here, defendant has hired high-priced out-of-town attorneys. Such a rule would discourage plaintiffs injured by unlawful discrimination from filing suit and would prevent them from obtaining attorneys of the same caliber as those available to defendants. *Cf. Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Johnson* v. *Georgia Highway Express, Inc.* 488 F.2d 714, 719 (5th Cir. 1974). Such a rule also would encourage employers to refuse to conciliate their violations and to delay proceedings, as Uniroyal has in this ten-year-long litigation, in an attempt to defeat by attrition plaintiffs' meritorious claims for relief.

Certiorari should therefore be denied.

Respectfully submitted,

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No. 81-2135

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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UNIROYAL, INC.,
*Petitioner,*

v.

ALTA CHRAPLIWY, *et al.*,
*Respondents.*

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pursuant to Rule 22.6 of the Rules of this Court, Respondents Alta Chrapliwy, et al., respectfully submit this Supplemental Brief to address the significance of this Court's recent decision in *Hensley* v. *Eckerhart*, No. 81-1244 (May 18, 1983), to the pending petition for certiorari in this case.

Nothing in *Hensley* warrants this Court's review of the decision of the United States Court of Appeals for the Seventh Circuit in *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. filed*, No. 81-2135 (petn. filed May 19, 1982). To the contrary, the reasoning of the Court's opinion and the separate concurring

opinions in *Hensley* confirms the correctness of *Chrapliwy* and provides no basis whatsoever for believing that the Seventh Circuit might alter its position if required to reconsider the case. Accordingly, *Hensley* does not support the grant of certiorari in this case, and likewise provides no basis for vacating *Chrapliwy* to require the Seventh Circuit to consider anew issues that were carefully and correctly decided there in the first instance.

The sole question presented and decided in *Hensley* is whether "a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley*, *supra*, slip op. at 1. As the Court's opinion explained, "the most critical factor [in assessing the reasonableness of the prevailing plaintiff's fee award] is the degree of success obtained." *Id.* at 11.

> Where a plaintiff has obtained excellent results, his attorney should receive a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.

*Id.*

The record in this case leaves no room for doubt that the plaintiffs in *Chrapliwy* fully prevailed. Plaintiffs here obtained a settlement agreement that required defendant Uniroyal to pay the 526 members of the plaintiff class cash and pension benefits totaling $9,318,000, to reinstate 296 terminated class members to active employment with full seniority, and to improve job opportunities for all female workers. Plaintiffs understand that this remains the largest recovery in any case of sex discrimination in employment at a single industrial plant.

There likewise can be no question that plaintiffs' efforts to have Uniroyal debarred as a federal contractor

forced the company to settle this Title VII case.[1] As the Seventh Circuit explained, the plaintiffs' pursuit of Uniroyal's debarment as a federal contractor was a reasonable litigation response to the delay occasioned by the death of the presiding judge and to the appearance "that defendant was taking advantage of the situation, and doing nothing to provide relief for the members of the plaintiff class." 670 F.2d at 763. Indeed, the district court had earlier found that plaintiffs' pursuit of this means of redress was necessary to discharge their responsibilities.

> As representatives of the class, they were charged with the responsibility of initiating whatever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal.

*Chrapliwy* v. *Uniroyal, Inc.*, 12 F.E.P. Cases 1661, 1663 (N.D. Ind. 1976).

Plaintiffs' effort was successful, and forced Uniroyal to settle this Title VII case in order to retain its lucrative federal contracts. As the Seventh Circuit explained:

> The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because

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[1] The term "debarment" refers to cancellation of existing federal contracts and the declaration of ineligibility to obtain future federal contracts pursuant to Executive Order 11246 and related federal regulations, which prohibit employment discrimination based on race, color, religion, sex, or national origin by those who contract with the federal government, and which impose affirmative obligations on federal contractors to ensure that their employees are not subjected to discrimination. The Secretary of Labor and the Director of the Office of Federal Contract Compliance Programs are responsible for the issuance and enforcement of regulations under the Order. *See generally*, 41 C.F.R. Ch. 60 (1981).

> the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action and in that sense was within the Title VII action.

670 F.2d at 767.

Nor can there be any dispute as to the direct impact of plaintiffs' pursuit of the debarment remedy on the successful settlement of the Title VII case. Both the district court and the Seventh Circuit concluded that plaintiffs' pursuit of the debarment remedy "directly contributed" to the successful settlement of the Title VII case. Indeed, as the court of appeals noted, defendant Uniroyal conceded that point:

> The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near.

670 F.2d at 673, citing *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 451 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), *petn. for cert. filed*, No. 81-2135, (May 19, 1982).

In this context, it is clear that *Hensley* provides no support for Uniroyal's challenge to the district court's authority to award attorney's fees for plaintiffs' work in forcing settlement of the Title VII case by causing Uniroyal's debarment as a federal contractor. To the contrary, *Hensley* confirms that the award of attorney's fees for this dispositive litigation effort was clearly correct.

The second basic question posed by Uniroyal's petition relates to the applicable rate for the award of attorney's

fees. Uniroyal's position on this issue is that the rates for plaintiffs' lead counsel—a Washington attorney with substantial experience in complex litigation—must be limited to the rates charged by members of the local bar in Indiana, where the litigation was conducted. Again, however, *Hensley* confirms the correctness of the Seventh Circuit's ruling that the hourly rates charged by plaintiff's lead counsel were reasonable.

The record discloses that both sides extensively relied on the services of "similarly skilled and expensive counsel to represent its interests in this suit." 509 F.Supp. at 455. The district court specifically noted, moreover, that "[i]t would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys." 509 F.Supp. at 456. Finally, the record also reveals that the rates sought by plaintiffs' lead counsel and awarded by the court of appeals were the same as the rates that counsel had actually charged in other litigation in the very court in which the fee award was sought, and were comparable to the rates Uniroyal paid its defense counsel. *See* 509 F.Supp. at 456.[2]

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[2] Uniroyal belatedly maintains in its petition for certiorari that the district court was required to develop a factual record establishing that plaintiffs' lead counsel, Thomas R. Ewald, actually charged the rate sought in this case to other clients. That issue was not raised in the district court, however, and was invented for the first time on appeal. In any case, it is a non-issue. Plaintiffs' answers to Uniroyal's interrogatories propounded in the fee litigation implicitly indicate that the rates given are counsel's actual rates. Furthermore, the published decisions of the United States District Court for the Northern District of Indiana and of the Seventh Circuit demonstrate the extensive experience of plaintiffs' lead counsel in other litigation in the very court in which the fee award was sought. See City of Mishawaka, Indiana v. American Electric Power Co., Inc., 465 F.Supp. 1320 (N.D. Ind. 1979), aff'd in part and vacated in part, 616 F.2d 976 (7th Cir. 1980),

Under these circumstances, any award based on rates other than those sought by plaintiffs and allowed by the Seventh Circuit would not provide the "fully compensatory fee" that the *Hensley* Court recognized a counsel for a civil rights plaintiff who obtains "excellent results" should expect, *Hensley, supra*, slip op. at 11; *see also* Brennan, J., concurring in part and dissenting in part, slip op. at 7.

One final factor argues strongly for denial of certiorari: the time has long since passed for this litigation to end. This Title VII case was filed in November 28, 1972, and culminated in a successful settlement in October 23, 1979. During this period of protracted litigation, plaintiffs' counsel received no fees whatsoever. Litigation over attorney's fees began in the spring of 1980, and that litigation has now continued for three years. Indeed, this petition for certiorari has been pending for one year.

Bearing in mind the *Hensley* Court's admonition that "[a] request for attorney's fees should not result in a second major litigation," *Hensley, supra*, slip op. at 12; *see also* Brennan, J., concurring in part and dissenting in part, slip op. at 14, it is clear that this petition should be denied and this seemingly interminable litigation be brought to its conclusion. Although plaintiffs' counsel received an initial interim award of some of the fees they earned and an additional partial award of fees that were not contested on appeal, the majority of the total fees to which counsel are entitled remain unpaid, more than a

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cert. denied, 449 U.S. 1096 (1981); City of Mishawaka, Indiana, et al. v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978). Thus, the hourly rate sought by plaintiff's lead counsel was not an "out of town" rate, but rather the "local" rate this attorney has charged in other cases before the same district court, just as were the comparable rates Uniroyal paid its defense counsel from New York, Washington, and Chicago.

decade after this lawsuit was begun. Clearly, this is an instance where further litigation over attorney's fees would simply further delay the inevitable, to the disservice of the objectives of the civil rights statutes and the judicial system that enforces them. Respondents therefore respectfully urge that certiorari be denied.

Respectfully submitted,

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